The Government of India v Cairn Energy India Pty Ltd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC(ARB)-14 OF 2011
MARY LIM J
18 NOVEMBER 2013

Arbitration — Award — Appeal — Parties entered into oil and gas joint venture — Dispute regarding costs recoveries claimed and calculation of post tax rate of return — Matter taken to arbitration — Award Tribunal favoured both parties — Application to set aside whole award made — Whether award dealt with dispute contemplated by or falling within terms of submission to arbitration — Whether award kept with terms of mandate — Whether acted beyond scope of submission — Arbitration Act 2005

The parties had entered into an oil and gas joint venture and subsequently entered into a Production Sharing Contract ('PSC'). Dispute arose between the parties regarding the costs recoveries claimed by the respondents and the calculation of Post Tax Rate of Return ('PTRR'). The parties then referred the matter to arbitration and the Award Tribunal favoured both parties and allowed the defendants' claim whilst also allowing the plaintiff's counterclaim. In the present application, the plaintiff sought to set aside the whole award made, pursuant to s 37(1)(a)(iv), (v) and (b)(ii) read with sub-ss 30(2) and (5) of the Arbitration Act 2005 ('the Act'), on the grounds that the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration; the award contained decision on matters beyond the scope of the submission to arbitration; and the award was in conflict with public policy. The plaintiff submitted that s 37(1)(a)(iv) and (v) of the Act were engaged as the impugned award dealt with a dispute 'not contemplated or not falling within the terms of the submission' and 'on matters beyond the scope of the submission'. It was further submitted that the Arbitral Tribunal had rendered an award that did not keep with the terms of the mandate as it had acted beyond the scope of the submission as contained in the PSC.

Held, dismissing the application with costs of RM100,000:

(1) When dealing with challenges under sub-para 37(1)(a)(iv) and (v); and (b)(ii), the challenge was not determined by reference to the substantive law of the contract. As the seat of arbitration was Kuala Lumpur, the curial law was that of the seat, that was, Malaysian law; and it remained so even after the award had been granted or handed down. Although Indian law was the substantive law or proper law of the contract or PSC, and English law was the law of the arbitration agreement, that in no way

meant that Indian *lex arbitrii* applied on the determination of an application under s 37 (see paras 159 & 161).

(2) The court's powers were not invoked in the field of appellate jurisdiction. The court's powers here were specifically enacted under statute. Since the court did not sit in appellate capacity, the court did not scrutinise the merits of the parties' respective case or responses before the Arbitral Tribunal. The court must also resist interfering in the decisions of the Arbitral Tribunal save where it was prescribed under the Act. Not only were courts slow to intervene even where there is discretion to do so, the courts were cognisant of the fact that as supervisory courts, there was a more than healthy respect for party autonomy and party choice (see paras 171–172).

(3) The Arbitral Tribunal had, at all times, acted and decided entirely within the parameters of the submission by the parties. The Arbitral Tribunal displayed extreme care and concern in their deliberations, ensuring that they knew and understood what were the submissions before them and what was required of them; received quite properly, documentary and oral evidence from all parties including expert evidence; considered all that evidence and submissions; deliberated and rendered a reasoned award. The contents of the award reflected the great care taken by the Arbitral Tribunal and it was testimony of the reasons why they were chosen by the parties themselves in the first place. The award indeed reflected the conscientious, careful, anxious and balanced deliberations of the Arbitral Tribunal (see paras 199 & 202).

(4) The arbitration agreement was housed in article 34 of the PSC and it did provide for 'all disputes, differences or claims arising out of or in connection with any of the terms and conditions' of the PSC or concerning the PSC's interpretation to be referred to arbitration. Even taking a narrow approach on arbitration agreements, it was quite apparent that the Arbitral Tribunal had the necessary jurisdiction to deal with the issues that it finally did (see para 205).

(5) The award contained conclusions that the Arbitral Tribunal made upon findings of fact which were obviously not made mechanistically, but with full evaluation of the evidence presented before it. The Arbitral Tribunal considered the outline history and made specific findings. It took into account the 1996 update, its incorporation into the work program and budget for 1997/1998 for the increase in production from 35000 BOPD to 50000 BOPD which was approved by the DGH and the plaintiff. The Arbitral Tribunal found that there were de facto revisions of the RDP that sufficiently complied with article 11.3 so as to allow the defendants to contend that the RDP was amended so that the costs incurred after 1999/2000 were incurred in connection with the RDP, as amended. Under such circumstances, it could not be seen as to how that could

possibly be a ground to suggest that the award dealt with a dispute that was not contemplated or not falling within the terms of submission. On the contrary, the award fully contained matters well within the terms of submission by the parties. There was nothing irrelevant that would render the award beyond those terms (see paras 239–240).

[Bahasa Malaysia summary

Pihak-pihak telah memeterai satu usaha sama minyak dan gas dan kemudiannya memeterai Kontrak Perkongsian Pengeluaran ('KPP'). Pertikaian timbul antara pihak-pihak berhubung kos-kos pemulihan yang dituntut oleh responden-responden dan pengiraan Kadar Cukai Pulangan Selepas ('KCPS'). Pihak-pihak kemudiannya merujuk perkara kepada timbang tara dan award tribunal menyebelahi kedua-dua pihak dan membenarkan tuntutan defendan di samping itu juga membenarkan tuntutan balas plaintif. Di dalam permohonan ini, plaintif memohon untuk mengetepikan keseluruhan award yang dibuat, menurut s 37(1)(a)(iv), (v) dan (b)(ii) dibaca dengan sub-ss 30(2) dan (5) Akta Timbang Tara 2005 ('Akta'), atas alasan bahawa award berhubung satu pertikaian tidak dijangkakan oleh atau tidak termasuk di dalam terma-terma hujahan kepada timbang tara; award tersebut mengandungi keputusan ke atas perkara-perkara melangkaui skop hujahan kepada timbang tara; dan award tersebut bercanggah dengan polisi awam. Plaintif berhujah bahawa s 37(1)(a)(iv) dan (v) Akta digunakan sebagai award yang dipersoalkan berhubung dengan satu pertikaian 'tidak dijangkakan atau tidak termasuk di dalam terma-terma hujahan' dan 'berkenaan perkara melangkaui skop hujahan'. Seterusnya dihujahkan bahawa Tribunal Timbang Tara telah memberikan award yang tidak memelihara terma-terma mandat memandangkan ia bertindak melebihi skop hujahan seperti yang terkandung dalam KPP.

Diputuskan, menolak permohonan dengan kos sebanyak RM100,000:

(1) Apabila menangani cabaran-cabaran di bawah sub-perenggan 37(1)(a)(iv) dan (v); dan (b)(ii), cabaran tersebut tidak ditentukan dengan merujuk kepada undang-undang substantif kontrak. Memandangkan timbang tara dijalankan di Kuala Lumpur, undang-undang kurial yang perlu digunakan merujuk kepada lokasi tersebut, iaitu, undang-undang Malaysia; ia kekal sedemikian walaupun selepas award diberikan atau diputuskan. Walaupun undang-undang India merupakan undang-undang substantif atau undang-undang sepatutnya untuk kontrak atau KPP, dan undang-undang Inggeris merupakan undang-undang perjanjian timbang tara, ini tidak bermakna bahawa *lex arbitrii* India boleh digunakan ke atas sebuah permohonan di bawah s 37 (lihat perenggan 159 & 161).

(2) Kuasa mahkamah tidak digunakan di dalam bidang kuasa rayuan. Kuasa mahkamah di sini digubal secara khususnya di bawah statut.

Memandangkan mahkamah tidak berada di dalam kapasiti rayuan, mahkamah tidak meneliti merit kes pihak masing-masing atau respons di hadapan Tribunal Timbang Tara. Mahkamah juga perlu menahan daripada campur tangan dalam keputusan Tribunal Timbang Tara melainkan ia dinyatakan di bawah Akta. Bukan sahaja mahkamah berjaga-jaga untuk campur tangan walaupun terdapat pertimbangan untuk berbuat demikian, mahkamah menyedari fakta bahawa sebagai mahkamah menyelia, terdapat daripada lebih perasaan hormat terhadap pihak autonomi dan pilihan pihak-pihak (lihat perenggan 171–172).

(3) Tribunal Timbang Tara telah, pada setiap masa, bertindak dan memutuskan sepenuhnya di dalam parameter hujahan oleh pihak-pihak. Tribunal Timbang Tara menunjukkan sifat berjaga-jaga dan memberi perhatian dalam tindak-tanduk mereka, memastikan bahawa mereka tahu dan memahami apa hujahan-hujahan yang dikemukakan di hadapan mereka dan apa yang diperlukan daripada mereka; menerima dengan baik keterangan dokumentari dan lisan daripada kesemua pihak termasuklah keterangan pakar; menimbangkan kesemua keterangan dan hujahan; membincangkan dan memberikan sebuah award beralasan. Isi kandungan award menunjukkan sikap berjaga-jaga yang diambil oleh Tribunal Timbang Tara dan ini merupakan keterangan alasan mereka dipilih pada awalnya. Award tersebut sememangnya menunjukkan perbincangan teliti, berhati-hati, resah dan seimbang Tribunal Timbang Tara (lihat perenggan 199 & 202).

(4) Perjanjian timbang tara terletak di dalam artikel 34 KPP dan perjanjian tersebut memperuntukkan untuk 'semua pertikaian, perbezaan atau tuntutan yang timbul daripada atau berhubung dengan mana-mana terma dan syarat-syarat' KPP atau berkenaan dengan penterjemahan KPP perlu dirujuk kepada timbang tara. Walaupun dengan mengambil pendekatan singkat ke atas perjanjian timbang tara, adalah jelas bahawa Tribunal Timbang Tara mempunyai bidang kuasa yang diperlukan untuk menangani isu-isu seperti yang telah dilakukannya (lihat perenggan 205).

(5) Award tersebut mengandungi kesimpulan bahawa Tribunal Timbang Tara membuat dapatan fakta yang secara jelas tidak dibuat secara mekanikal, tetapi dengan penilaian penuh keterangan yang dikemukakan di hadapannya. Tribunal Timbang Tara mempertimbangkan garisan sejarah dan membuat dapatan khusus. Pencairan tribunal mengambil kira kemas kini tahun 1996, kemasukannya ke dalam program kerja dan bajet untuk tahun 1997/1998 bagi peningkatan pengeluaran daripada 35,000 BOPD kepada 50,000 BOPD yang diluluskan oleh DGH dan plaintif. Tribunal Timbang Tara mendapati bahawa terdapat semakan *de facto* RDP yang mematuhi sepenuhnya dengan artikel 11.3 untuk membenarkan

defendan-defendan untuk menegaskan bahawa RDP dipinda agar kos yang ditanggung selepas tahun 1999/2000 ditanggung selaras dengan RDP, seperti yang dipinda. Di dalam keadaan tersebut, tidak dapat dilihat bagaimana bahawa perkara tersebut berkemungkinan dijadikan alasan untuk mencadangkan bahawa award berhubung dengan satu pertikaian itu tidak dijangkakan atau terangkum dalam terma-terma hujahan. Sebaliknya, award tersebut mengandungi perkara-perkara yang sepenuhnya berada di dalam terma-terma hujahan oleh pihak-pihak. Tiada perkara yang tidak relevan yang boleh menjadikan award tersebut melangkaui terma-terma tersebut (lihat perenggan 239–240).]

Notes

For cases on appeal, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1727–1736.

Cases referred to

ABB AG v Hochtief Airport GmbH [2006] 2 Lloyd's Rep 1, QBD (refd)
AJU v AJT [2011] 4 SLR 739, CA (refd)
Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and Another [2006] 3 SLR 174, HC (refd)
Alopi Parshad & Sons Ltd v The Union of India AIR 1960 SC 588, SC (refd)
Amaltal Corporation Ltd v Maruha (HZ) Corporation Ltd [2004] 2 NZLR 614, CA (refd)
Associated Engineering Co v Govt of Andhra Pradesh & Anor AIR 1992 SC 232, SC (refd)
Boardwalk Regency Corp v Maalouf (1992) 6 OR (3d) 737, CA (refd)
Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The MV Pamphilos) [2002] 2 Lloyd's Rep 681 (refd)
CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305, CA (refd)
Cairn Energy India Pty Ltd v The Government of India [2009] 6 MLJ 795, CA (refd)
Charter Reinsurance Co Ltd v Fagan [1997] AC 313, HL (refd)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)
Corp v Maalouf (1992) 6 OR (3d) 737 (refd)
Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763, SC (refd)
Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd (t/a Shell International Trading Co) [1990] 1 AC 295, HL (refd)
Downer-Hill Joint Venture v Government of Fiji [2005] 1 NZLR 554, HC (refd)
Fiona Trust & Holding Corp v Privalov [2008] 1 Lloyd's Rep 254, HL (folld)
Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80, HC (refd)

Government of India, The v Cairns Energy India Pty Ltd & Ors [2011] 6 MLJ 441, FC (refd)
Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 (refd)
Hoecheong Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404, PC (refd)
Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application [2011] 7 MLJ 539, HC (refd)
John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan) [2001] 1 SLR(R) 443, HC (refd)
Lesotho Highlands Development Authority v Impregilo SpA [2006] 1 AC 221, HL (folld)
Lim Phin Kian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)
London and North Western and Great Western Joint Rly Companies v Billington [1899] AC 79, HL (refd)
Margulead Ltd v Exide Technologies [2004] 2 All ER (Comm) 727, QBD (refd)
Nilo Heime Akt v Merel & Co Ltd [1959] 2 Lloyd's Rep 292, QBD (refd)
Oil & Natural Gas Corp Ltd v Saw Pipes Ltd [2003] 5 SCC 705, SC (refd)
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR 597, CA (refd)
PT Prima International Development v Kempinski Hotels SA and other appeals [2012] 4 SLR 98, CA (refd)
Parsons & Whittemore Overseas Co Inc v Societe Generalede L'Industrie du Papier 508 F 2d 969 (refd)
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, HL (refd)
Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd [2000] 3 NZLR 338n, PC (refd)
Rajasthan State Mines & Minerals Limited v Eastern Engineering Enterprises & Anor AIR 1999 SC 3627, SC (refd)
Rederij Lalemant v Transportes Generales Navigacion SA (The Maria Lemos) [1986] 1 Lloyd's Rep 45, QBD (refd)
Societe Franco-Tunisienne D'Armement-Tunis v Government of Ceylon, The Massalia [1959] 3 All ER 25, CA (refd)
Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd [2007] 3 SLR 86, CA (refd)
Soleimany v Soleimany [1999] QB 785, CA (refd)
Steel Authority of India Ltd v JC Budharaja, Government and Mining Contractor AIR 1999 SC 3275, SC (refd)
Sui Southern Gas Co Ltd v Habibullah Costal Power Co (Pte) Ltd [2010] 3 SLR 1, HC (refd)
Sumitomo Heavy Industries Ltd v ONGC Ltd AIR 1998 SC 825, SC (refd)
Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission [1994] 1 Lloyds' Rep 45 (refd)

Travancore Devaswom Board v Thanath International [2004] 13 SCC 44, SC (refd)
VV and another v W [2008] 2 SLR 929, HC (refd)
Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd (2003) 2 EGLR 149, CA (refd)
Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd (1985) 2 EGLR 14, QBD (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 10, 30, 30(2), (5), 37, 37(1)(a)(iv), (v), (b)(ii), 37(2)(a), (b), 39, 41(2), 42
Arbitration Act of 1996 [UK] ss 48(4), 68, 68(2), (2)(b), 69
Arbitration and Conciliation Act 1996 [IND] ss 28(3), 34
Capital Markets and Services Act 2007 s 360
International Arbitration Act (Cap 143A)[SG] First Schedule

Cyrus V Das (Lam Ko Luen with him) (Shook Lin & Bok) for the plaintiff.
Vinayak Pradhan (Ooi Huey Min & Henry Ting with him) (HM Ooi Associates) for the defendant.

Mary Lim J:

THE PARTIES

[1] The plaintiff was the respondent in arbitration proceedings initiated by the defendants. The parties have been to court before in relation to the interim award rendered by an arbitral tribunal comprising Sir Anthony Evans, Dr AS Anand and Mr Andrew Berkeley (see *The Government of India v Cairns Energy India Pty Ltd & Ors* [2011] 6 MLJ 441). The present application seeks, inter alia, to set aside the final award dated 18 January 2011 ('the award') delivered in Kuala Lumpur. The seat of arbitration is Kuala Lumpur.

[2] The plaintiff's application is made pursuant to sub-paras 37(1)(a)(iv) and (v) and (b)(ii) read with sub-ss 30(2) and (5) of the Arbitration Act 2005 (Act 646). The application is supported by an affidavit deposed by Partha Sarathi Das, the director (Exploration II) in the Ministry of Petroleum and Natural Gas of the plaintiff (see encl 16). At para 5, she averred that the plaintiff is entitled to have the award set aside on three grounds:

(a) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(b) the award contains decisions on matters beyond the scope of the submission to arbitration;

(c) the award is in conflict with public policy.

[3] Specifically, she averred that the arbitral tribunal dealt with and decided the dispute in a manner not falling within the terms of the submission to arbitration within the meaning of s 37(1)(a)(iv) of the Act 646 because it:

(a) had failed to decide the BDC issue on the basis of capped costs involving 21 wells as expressly stipulated in cl 15.5(c)(xi) of the production sharing contract; and

(b) had disregarded the stipulation in cl 15.5(c)(xi) and decided on the costs of drilling an developing the seven wells separately for BDC purposes.

[4] Further, she claimed that the arbitral tribunal's decision in para (I) of the award related to matters beyond the scope of submission to arbitration and as such offended s 37(1)(a)(v) of the Act 646 as it related to matters in the future and/or it predetermines a future dispute as yet unformulated or presented.

THE PRODUCTION SHARING CONTRACT

[5] In order to appreciate the plaintiff's arguments, it is useful to review the contractual arrangements between the parties. The underlying contract between the plaintiff and the defendants is actually an agreement made with another party, that is, the Oil and Natural Gas Corporation Ltd ('ONGC', substantially owned by the plaintiff). In this production sharing agreement dated 28 October 1994 ('PSC'), the defendants ('the companies') together with ONGC ('contractor') were appointed by the plaintiff to commercially explore and develop an oil and gas field known as the 'Rawa Oil and Gas Field' located in the offshore area in the Bay of Bengal in India. The designated oil fields under the defendants' charge were covered by a plan known as the 'Rawa Development Plan' ('RDP') submitted by the defendants. The RDP was accepted and made part of the PSC.

[6] Pursuant to articles 11.1 and 11.2 of the PSC, the defendants were required to carry out petroleum operations as per the RDP. For these operations, the defendants could recover actual expenditure incurred in the exploration/development of and production from the Rawa Field. However, under articles 15.5(b) and (c), in respect of development cost, the costs recovery were restricted to USD188.98m plus 5% in what is called the 'Base Development Cost' ('BDC'). The plaintiff referred to this cost cap as the 'BDC cap'. The PSC envisaged that the revenue generated under the PSC was to be shared between the plaintiff and the defendants. Such recovery however, did not include the profit element.

[7] Now, in the RDP was a work program. In that work program, there was specific reference to the cost of drilling 21 wells which involved drilling 19 development wells and two gas production wells.

[8] In March 1999, the defendants had drilled 14 out of 21 wells. They had reached the production rate of 35,000 barrels of oil per day ('BOPD'). The remaining seven wells were then reclassified as 'additional work program' which they claimed fell outside the BDC cap. The defendants claimed that they were entitled to recover the full development costs in addition to the BDC for these seven wells. The defendants sought full reimbursement of the expenditure incurred after 1999–00, beyond the cost cap; or alternatively, claimed to increase the cost cap itself to permit recovery of the expenditure in full on the ground of 'material variation in the reservoir characteristics' under article 15.5(e)(iii) of the PSC.

[9] The plaintiff contended otherwise. It maintained that the costs of these seven wells were within the approved work program of the RDP and the PSC as drilling the seven wells was an integral part of the 21 wells in article 15.5(c)(xi).

[10] Consequently, the dispute was referred to arbitration under article 34 of the PSC.

THE AWARD

[11] The arbitral tribunal's award favoured both parties. In essence, the arbitral tribunal, inter alia:

(a) allowed the defendants' claim on the non-applicability of the BDC cap to the seven wells; and

(b) allowed the plaintiff's counterclaim.

[12] Despite this, the present application seeks to set aside the whole award.

[13] Both parties had their respective team of extremely able legal counsel, led no less than by reputable learned senior counsel in this area of expertise. Hence, the written and oral submissions canvassed were expectedly well-researched, extensive, detailed and formidable. The plaintiff filed submissions on behalf of plaintiff, supplementary submissions on behalf of plaintiff and rebuttal points for closing submissions by plaintiff whereas the defendants filed defendants' written submissions, defendants' rebuttal points, defendants' comments on rebuttal points for closing submissions by plaintiff, defendants' postscript and defendants' costs submissions.

[14] However, after very careful considerations of both the written and oral submissions and the cause papers and most importantly, the award the court declined the orders sought by the plaintiff and dismissed the application with

costs.

THE PLAINTIFF'S SUBMISSIONS

[15] Cyrus Das, learned lead counsel for the plaintiff argued that sub-paras 37(1)(a)(iv) and (v) of Act 646 were engaged as the impugned award dealt with a dispute 'not contemplated or not falling within the terms of the submission' and 'on matters beyond the scope of the submission'. He contended that the arbitral tribunal had rendered an award that did not keep within the terms of the mandate as contained in the PSC in which case, it had acted beyond the scope of the submission as contained in the PSC.

[16] This is how he pitched his client's case and it will be set out *in extenso*. He contended that para 37(1)(a) had to be read together with the general pronouncements found in s 30 of the Act 646. Sub-sections 30(2) and (5) required the arbitral tribunal's decision to be in accordance with the agreed law of the parties to the arbitration and with the terms of the PSC. This meant that at all time, the arbitral tribunal must act within the terms of its arbitral authority. He argued that the determination of whether the arbitral tribunal had breached this mandate was to be answered by reference to the laws of India since by virtue of article 33.1 of the PSC, the governing law of the PSC is the law of India.

[17] The plaintiff argued that the Supreme Court of India had repeatedly held that an arbitrator derived his authority from the contract. If the arbitral tribunal therefore 'fails to give effect to the clear language of the PSC' or fails to 'find in accordance with the PSC', or if its award runs 'contrary to an interpretation of the PSC by application of the principles of contract under Indian law'; or if the arbitral tribunal 'acts in disregard of the terms of the contract or rewrites the contract, he would have exceeded his jurisdiction and acted outside the scope of his arbitral authority'. The plaintiff relied on the Supreme Court's decision of *Associated Engineering Co v Govt of Andhra Pradesh & Anor* AIR 1992 SC 232 which found that an 'arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, (2nd Ed), p 641) … A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award'.

[18] Similar views were expressed in several other decisions and were relied on, namely *New India Civil Erectors (P) Ltd v Oil & Natural Gas Corpn* AIR 1997 SC 980, *Steel Authority of India Ltd v JC Budharaja, Government and Mining Contractor* AIR 1999 SC 3275 and *Rajasthan State Mines & Minerals*

Limited v Eastern Engineering Enterprises & Anor AIR 1999 SC 3627 with the Supreme Court opining that a departure from the contract ' … may tantamount to mala fide action'.

[19] Further, it was the plaintiff's submissions that the case law on s 34 and sub-s 28(3) of the Arbitration and Conciliation Act 1996 of India which provisions are similar to s 37 and sub-s 30(2) of Act 646, applied. In this regard, the Supreme Court of India's decision in *Oil & Natural Gas Corp Ltd v Saw Pipes Ltd* [2003] 5 SCC 705 ('Saw Pipes') was relevant. In *Saw Pipes*, the Supreme Court was of the view that an arbitral award was liable to be set aside under s 34 where the arbitral tribunal did not decide the dispute in accordance with the terms of the contract. Such an award contravened sub-s 28(3) as it was 'patently illegal' (see pp 718–719).

[20] Learned counsel further argued that such an award was in any case liable to be set aside under sub-para 37(1)(b)(ii) of Act 646 as it would be in conflict with the public policy of Malaysia. These observations were shared in the same Supreme Court decision of *Saw Pipes*. Another aspect in this argument which will be expanded later is that by traversing beyond the parameters of submission, the arbitral tribunal had then decided on an issue which the plaintiff had had no opportunity to address, giving rise then to an allegation of a breach of natural justice. Existence of a breach of natural justice must surely mean this is an award which must be set aside for being in conflict with the public policy of Malaysia.

[21] In his elaboration, learned counsel for the plaintiff explained that the arbitral tribunal got it all wrong because it was erroneous in its approach and thereby its findings when resolving the dispute. It fell into error in three respects, namely in relation to 'the 21 wells/cap issue'; 'the reservoir issue'; and finally 'the award in futuro issue'.

[22] First, in respect of what the plaintiff termed as the 21 wells/cap issue', the plaintiff argued that the RDP envisaged the drilling and development of 21 wells. The RDP and the work program in the RDP program, both being proposed by the defendants themselves, treated the 21 wells as a single work program for which no segregation for any reason at all was envisaged.

[23] There was also acceptance by the first defendant's managing director that capital costs of drilling the 21 wells at USD218m was subject to the BDC cap and that any excess beyond that sum was accordingly not recoverable. This proposal is said to be reflected in article 15.5(c)(xi) of the PSC.

[24] The plaintiff contended that as a result of this position under the PSC as well as from the conduct of the parties, the arbitral tribunal itself had referred

to these 21 wells as the 'contractual number of 21 wells'. However, the arbitral tribunal was inconsistent in giving this recognition throughout its award. A

[25] The plaintiff further argued that the arbitral tribunal's segregation of the wells into 14 wells as falling within the BDC cap and seven wells as falling outside the BDC cap was 'contractually impermissible'. This was because article 15.5(c) had itself specifically used the words 'such costs shall include' the 'drilling of 19 development wells and two gas wells'. Thus, the arbitral tribunal's segregation of the wells 'violated' the substratum upon which the dispute had been submitted for adjudication in the first place; and that it amounted to 'rewriting' the terms of the PSC. B C

[26] The plaintiff proceeded to point out parts of the award where the arbitral tribunal had instead referred to article 15.5(c)(xi) as an 'estimate' or that it was 'not an undertaking to drill 21 wells' — see paras 100 and 112 of the award. D

[27] It was also the plaintiff's contention that the arbitral tribunal's reliance on the production of 35,000 BOPD as a cut-off figure and as providing the justification to segregate the wells had 'no relevant basis' as 2 of the 21 wells were gas wells. The BOPD had no relevance at all to the gas wells. E

[28] Lastly, as apparent from para 117 of the award, the plaintiff submitted that the parties themselves had recognised that the development costs of drilling more than 21 wells would fall outside the cap and be fully recoverable by the defendants. For this, a sum of RM65.9m was accepted by the parties as falling outside the cap. This sum comprised 3 items one of which was under the description of 'wells beyond 21 wells'. F G

[29] Insofar as the 'cap issue' was concerned, the plaintiff submitted,inter alia, that the award was contrary to the arbitration mandate because it is 'a legal distortion of the true scope of article 15.5(c)(xi) of the PSC'; that it re-writes that clause and ignores its true legal effect; and it entirely ignores the parties' clear reference to the drilling of two gas production wells. H

[30] The plaintiff submitted that the arbitral tribunal's decision involved 'such serious legal deviations from the parties' agreement that the award can only be explained as a rewriting of the agreement's core terms.' The plaintiff claimed that the award effectively 'elevated the production level of 35,000 BOPD to the status of a cut-off point justifying the terminating of the application of the costs cap, and ignores the agreed work programme under article 15.5(c)(i) to (xi).' Again, this went beyond the terms of submission rendering the award liable to be set aside. I

[31] Various portions of the award were identified in support, namely paras 81 (findings (viii) and (x) on pp 40 and 41 respectively), 85, 86, 32 (third sentence, last but one sentence), 89 and 100. In para 89, the plaintiff had contended that the ' … cap did not cease to apply when the production target of 3,000 BOPD was reached, but only when the claimants completed the 'work programme' listed in article 15.5(c). That was not until 2007/8 when the total number of wells drilled in the relevant area reached 21, the figure specified in article 15.5(c)(xi).' This contention was rejected by the arbitral tribunal. At para 100 of the award, two reasons were offered.

[32] The plaintiff argued that the two reasons offered by the arbitral tribunal as to why the cap ceased to apply once the production level reached 35,000 BOPD had 'serious consequences as it removes the cap and permits full recovery of contractors' cost once the level of 35,000 BOPD is reached'. Several arguments were articulated in support.

[33] First, according to the plaintiff, there was no provision in the PSC or the RDP for such a contingency. If, indeed it was the parties' intention, then it would have been expressed in the clearest of terms. Secondly, such an interpretation 'ignored the work programme under the RDP and the PSC of drilling 21 wells'. It was said that the arbitral tribunal's inclination to lean in favour of 'uncommerciality' of the defendants being required to drill beyond the 14 wells to achieve the 35,000 BOPD failed to 'maintain a proper balance in recognising the respective commercial interest of the parties'.

[34] Thirdly was the arbitral tribunal's contradictory stand on the 21 wells which was pointed out earlier. On the one hand, it recognised the 21 wells as 'the contractual number of 21 wells' to be drilled under the PSC; while on the other, it referred to these 21 wells as the 'current estimate of the number of wells required to obtain the object'.

[35] As a further illustration of how the arbitral tribunal had been illogical in its application of the cap contingent was its failure to appreciate the full consequences of its decision on the status of this 35,000 BOPD as a cut-off point. According to the plaintiff, if this level had been reached by simply drilling just one or two wells, then 'the entire work programme would stand radically changed for costs recovery purposes. In that event, the remaining 19 or 20 wells would not be under any cap restraints' in which case, the whole basis for which a BDC cap was imposed in the first place would have been destroyed.

[36] The plaintiff submitted that by this, the arbitral tribunal had in effect, ignored the core elements of the PSC and had re-written as well as fundamentally and radically changed the work program and the PSC. It suggested that the effect of the decision is to re-write article 15.5(c)(xi) to read

'the drilling of as many wells as shall be necessary to produce 35,000 BOPD, provided the total number of petroleum wells shall not exceed 19; and the contractors shall also drill two gas production wells'.

[37] A comparison of the existing wording in the PSC, which the plaintiff maintained was clear, and what was decided by the arbitral tribunal was then undertaken to drive home this point. Quoting Lord Mustill's comment in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at p 388, the plaintiff argued that this was to 'force upon the words a meaning which they cannot fairly bear' and which would in effect 'substitute a bargain which the arbitral tribunal has constructed out of thin air and ignoring the contract's clear and contradictory meaning. The arbitral tribunal's function was to give effect to the clear contractual language and not distort, ignore or rewrite the terms 'in the tribunal's subjective notion of fairness'. Several decisions of Indian contract law, *Delhi Development Authority v Jitender Pal Bhardwaj* AIR 2010 SC 497, *Travancore Devaswom Board v Thanath International* [2004] 13 SCC 44; and *Alopi Parshad & Sons Ltd v The Union of India* AIR 1960 SC 588 were also cited in further support.

[38] The effect of the award meant that the plaintiff had to bear the costs of constructing the 21 wells once 35,000 BOPD was achieved. Such a result was in the plaintiff's submissions, not one which any 'rational system for review of arbitral awards can turn a blind eye to this award: for the effect is to substitute for the bargain struck in plain language (in article 15.5(c)(xi) of the PSC the clear and unequivocal reference to 'the drilling of 19 development wells and two production wells') a new stipulation that the cost of constructing these wells will be borne by the Government of India once 35,000 BOPD is achieved.'

[39] The arbitral tribunal was further accused of a 'flagrant oversight: in respect of the two gas production wells which were not dealt with in the award. The plaintiff argued that this demonstrated that the arbitral tribunal had chosen to re-write the PSC based on its false assumption that every aspect of article 15.5(c), including the main elements of the work program specified at article 15.5(c)(xi) 'must be subjugated to the achievement of 35,000 BOPD'.

[40] Moving next to the 'reservoir issue', this is where the defendants' alternative claim for full recovery of costs under article 15.5(e)(iii)(dd) of the PSC was allowed. Various parts of the award in support of this contention were also identified and closely analysed, and they are paras 87, 111, 112, 113, 114, 115, 138, 127 (heading: For the period 1994/1995 to 1999/2000), 145, 146, 162 to 168, and declarations (G) and (I) at p 73 of the award.

[41] From its analysis of these portions of the award, the plaintiff contended

A that the reasoning of the arbitral tribunal as reflected in these paras showed that it had exceeded its mandate and had acted without jurisdiction when allowing this claim. This is what happened.

B **[42]** In its decision, the arbitral tribunal had said that the defendants' alternative claims relied 'principally on (e)(iii)(dd), namely 'the range of physical reservoir characteristics being materially different' from those on which the plan was based …' The arbitral tribunal found that for the purposes of article 15.5(e)(iii)(dd):

C > … the enlarged reservoir known as Block A/D which we have called the increased reserves showed a range of physical characteristics that was materially different from those of the Fault Blocks defined in article 11.1 on which the Plan was based. We go so far as to say that that seems correct as a matter of common sense.

D **[43]** On closer analysis, the plaintiff found that the award here turned on the evidence of expert opinion submitted by the defendants, that is, the evidence of one Mr Crouch. The plaintiff submitted that Mr Crouch was not a witness of fact as he did not quote geological evidence, did not cite any investigation to justify re-delineation of the reservoir; and he gave an opinion that relied on data E that was not even compiled by Mr Crouch himself. Instead, Mr Crouch's evidence consisted of a comparison of the defendants' own initial understanding of the reservoir's parameters and the defendants' later understanding.

F **[44]** The plaintiff contended that the arbitral tribunal's decision on this point was unsound as it 'became confused on the difference between an unexpectedly abundant supply of reserves within the existing reserves and a material change in the range of physical reservoir characteristics'. The plaintiff G emphasised that there was a distinction between 'reserves' from 'reservoir'; and article 15.5(e)(iii)(dd) refers only to the latter.

[45] The plaintiff added that the tribunal seemed to 'have been impressed by the suggestion that the relevant area had yielded a plentiful supply of oil, and H this led them into using article 15.5(e)(iii)(dd) as an unjustified means of favoring the contractors'. This was said to be 'illegitimate' and 'involved a completely unjustified misapplication of that clause'.

I **[46]** The plaintiff embarked on tracing how the confusion on what it says is a 'vital distinction' between 'reserves' and 'reservoir' arose; finding that it all started at para 31 of the award where it said:

> The volume of reserves in the Rawa Field has proved far greater than the Plan contemplated.

[47] According to the plaintiff, it was evident from this that the arbitral tribunal had 'missed the point' as the 'PSC did not provide that an abundant flow of petroleum should form the basis of variation under article 15.5(e)(iii)(dd).'

[48] The plaintiff further submitted that it was wrong for the arbitral tribunal to have 'embraced a task which was not consistent with the terms of the arbitration submission' and engaged in a re-delineation of reservoir using 'commonsense' (see para 111 of the award) as the tribunal did not have 'technical competence or informed background information'. The plaintiff maintained that the reservoir characteristics as specified in the PSC in fact remained the same without any variation. All that happened was the reservoir contained 'more plentiful oil than estimated'. The plaintiff countered that 'increased reserves' could not as 'a matter of common sense' be equated to 'change in physical characteristics' in the reservoir., that is within the meaning of article 15.5(e)(iii)(dd).

[49] The plaintiff next proceeded to deal with the location of the seven wells drilled after 1999/2000; that these wells were within the area known as the 'existing discoveries' defined in article 11.1 by reference to identified fault lines:

11.1 Existing Discoveries

For the purposes of this article 11, the following oil and gas fields shall be regarded as Existing Discoveries:

(a) the fault block containing the Rawa 10, 12, 35 and 36 wells and further defined as having been encountered in sandstones between 1556 and 1660 meters subsea in Rawa 10 and between 1668 and 1717 meters subsea in Rawa 12;

(b) the fault block containing Rawa 17, 27, 34 and 37 wells and further defined as having been encountered in sandstones between 1639 and 1712 meters subsea in Rawa 17 and between 1604 and 1686 meters subsea in Rawa 27; and

(c) the fault block containing Rawa 1, 7 and 9 wells and further defined as having been encountered in sandstones between 1602 and 1650 meters true vertical depth subsea in Rawa 7 and between 1538 and 1649 meters subsea in Rawa 9.

[50] Since this 'large reservoir' was a fact known prior to the award of the PSC, it was contended that there was no variation from article 11.1 (b).

[51] The plaintiff submitted that it was the defendant's own mapping of reservoir details that had changed over a period of time which accounted for the

discrepancies or the defendants' misunderstanding of its own estimates. This being so, no additional compensation was permitted as it was still work done within the terms of the contract.

[52] It was the submission of the plaintiff that the arbitral tribunal's findings on the so-called 'increased reserves' in relation to the definition of 'existing discoveries' were inconsistent in various parts of the award. Paragraphs 105, 108, 109, 111 were identified:

> para 105: the arbitral tribunal initially concluded that the increased reserves were neither a 'New Discovery' nor a 'Satellite Field'
>
> para 108: the arbitral tribunal acknowledged that the increased reserves formed part of the same reservoir as the Fault Block identified as an 'Existing Discovery' in article 11.1(b)
>
> para 109: the arbitral tribunal concluded that the increased reserves are outside the limits of the Fault Blocks defined in article 11.1
>
> para 111: the arbitral tribunal concluded that the increased reserves which the plaintiff claimed the arbitral tribunal had equated to an 'enlarged reservoir' showed a range of physical characteristics that was materially different from those of the Fault Blocks defined in article 11.1

[53] From the above, the plaintiff contended that the arbitral tribunal had 'effectively concluded that the increased reserves are not part of the existing discoveries', it then 'follows that the arbitral tribunal had traversed into the territory of a new discovery and article 10 of the PSC would be applicable'. As a new discovery, the plaintiff added that the dictates of article 10 which deals with 'new discovery, Development and Production' must be complied with. Article 10 read together with articles 2.57 and 6.5(c) of the PSC provides for a procedure before a new discovery could be approved by the management committee and later the plaintiff itself.

[54] Further, the plaintiff submitted that article 15.5 could not have been applied because it only dealt with existing discoveries.

[55] The plaintiff therefore maintained that the findings amounted in fact and substance to a re-delineation of the reservoir. It was in this respect that the plaintiff said that the issue was 'never entrusted' to the arbitral tribunal. This finding was also criticised as amounting to a 're-writing of article 11.1 of the PSC.'

[56] As a new discovery or a re-delineation issue, neither of which were submitted to arbitration for determination, the plaintiff said that it was not given the opportunity to address this during the arbitral proceedings. This was

contrary to natural justice and against the public policy of Malaysia. The decisions of *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 and *Societe Franco-Tunisienne D'Armement-Tunis v Government of Ceylon, The Massalia* [1959] 3 All ER 25 were cited in support.

[57] In short, the plaintiff submitted that in upholding the defendants' claim here, the arbitral tribunal had exceeded the mandates given in which case, this application fell squarely within paras 37(1)(a) and (2)(b) of Act 646.

[58] Finally, the issue of the award being in futuro, offending sub-paras 37(1)(a)(v) of Act 646 as it decided on a matter which was beyond the scope of submission to arbitration. This is how it arises.

[59] Amongst the orders made was declaration I which reads:

(i) that the claimants are and shall be entitled to cost-recover further base development costs incurred by them in connection with the Rawa development plan after the contract year 2008/2009, if and to the extent that:

(a) such costs are incurred in further development of the reserves defined in this award as being materially different from the physical characteristics of the reservoir on which the original (1993) Rawa development plan was based; and/or

(b) the amount of the cap under article 15.5(b) of the PSC may be increased hereafter pursuant to article 15.5(e)(iii) of the PSC; and/or

(c) as the parties may agree;

but not otherwise.

[60] The plaintiff argued that this order offended sub-para 37(1)(a)(v) as it decided a matter which was beyond the scope of submission to arbitration. By this order, the arbitral tribunal had authorized the defendants to recover further base development costs after the contract year 2008/2009. This is said to be 'inherently bad as it pre-determines a future claim as yet unformulated or presented and without an opportunity to the plaintiff as paymaster to challenge the same'. The decision of *Nilo Heime Akt v Merel & Co Ltd* [1959] 2 Lloyd's Rep 292 where the court had set aside an award on a shipment of goods which had yet to be made was cited in support of this contention.

THE DEFENDANTS' SUBMISSIONS

[61] The plaintiff's submissions were met, in the affidavits in reply of the defendants as well as in the submissions of Mr Vinayak Pradhan, learned

counsel for the defendants. He submitted that none of the reasons put forth by the plaintiff warranted the setting aside of the award and he urged the court to dismiss the application with costs.

[62] The defendants' affidavits in reply were affirmed by Mark Justin Beeley. Mr Beeley is a qualified solicitor advocate who is authorised by the defendants to affirm the affidavits on their behalf. He was personally involved in the arbitration as co-counsel for the defendants, and he was present in Kuala Lumpur to receive the final award. Some of these affidavits were in relation to an interlocutory anti-suit injunction which does not concern us here. I shall be referring in particular to those filed in relation to the setting aside (encls 11 and 35; there were no affidavits filed by the plaintiff in respect of the latter).

[63] Aside from dealing with certain preliminary issues which set the context for the present application, issues such as the character of the arbitration (international ad hoc arbitration conducted in accordance with UNCITRAL Rules), the substantive law of the PSC (Indian) and the law of the arbitration agreement (English), Mr Beeley claimed in his affidavit affirmed on 27 May 2011(affidavit no 1 — encl 11) that the scope of the plaintiff's challenge of the award under Act 646 is limited. By this, he meant that grounds such as incapacity or invalidity of the arbitration agreement, challenges on notice of appointment of the arbitral tribunal, its composition and the procedure adopted as well as the fact that the subject matter of the dispute in the arbitration was fully capable of settlement by arbitration under Malaysian law, were accepted and agreed by the plaintiff; and that these grounds were not engaged in the present application.

[64] In this respect, it was the submission of learned counsel for the defendants that the relevant facts to the dispute in the arbitration were apparent from the award itself. These facts are not in dispute and ought not be in dispute when challenging the award because the arbitrators remain the 'sole judge' on the finding of facts as reaffirmed by the Court of Appeal in *Cairn Energy India Pty Ltd & Anor v The Government of India* [2009] 6 MLJ 795 at p 815.

[65] In other words, if the arbitral tribunal drew the wrong inferences of facts from the evidence presented, that 'itself is not sufficient as a ground to warrant setting aside his award'. It is not the function of this court to review the merits of the case; and ultimately and effectively, 'replace the findings' of the arbitral tribunal. This would be fly in the face of all established principles — see *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539 at p 571. This approach is consistent with the Model Law, upon which Act 646 was modeled after.

[66] Mr Beeley then registered his observations, offered clarifications and made corrections on the plaintiff's setting out of the 'Background to Dispute'; which matters will be addressed together with the legal submissions made by the defendants' counsel. Suffice to say that he explained in broad terms that the dispute was related to the extent of permissible recovery of both past and prospective 'Development Costs' by the (defendants) under the provisions of article 15.5 of the PSC.

[67] This was elaborated in his subsequent affidavit affirmed on 18 May 2012 (affidavit no 7 – encl 35) where he highlighted what he called 'objective elements regarding the PSC', set out 'uncontroversial' factual matters leading to the dispute, before pointing out that both parties were seeking 'declarations from the arbitral tribunal as to the correctness of their respective interpretations of the PSC'.

[68] He added that the 'dispute was never about the plaintiff paying monies out of its own pocket to the defendants'; that what the plaintiff sought in the arbitration was to 'preclude the defendants from recovering a substantial part of their investment of development costs' and thus enhance its own profit from the Rawa Oil & Gas Field at the expense of the defendants. This is what he meant.

[69] At para 11 of this affidavit, Mr Beeley explained that 'under the PSC, the (the defendants) funds all exploration, development and operation of the Rawa Oil & Gas Field and to the extent hydrocarbons are produced and sold, revenues obtained therefrom can be used to recoup their investments.' What remains is then split between the parties on 'terms highly favourable to the plaintiff'. Under the PSC, the defendants can only recover expenditure on the Rawa Oil & Gas Field that is approved by the management committee by a process known as 'cost recovery'. article 15.5 imposes a limit on the cost recovery of certain classes of 'development costs'. These limits are referred to as the 'BDC cap'. This cap 'was expressly premised on a number of assumptions, and had a built mechanism to allow for its own increase if any of those assumptions were invalidated'.

[70] He further deposed that in developing the Rawa Oil & Gas Field, the defendants had and continued to incur development costs in excess of double the initial amount of the BDC cap mentioned in article 15.5(c), that sum being US$188.98 + 5%. Some of these development costs were not caught by the limits of the BDC cap and were recovered without complaint from the plaintiff.

[71] However, in respect of some others, there were, forming disputes which went to arbitration. Specifically, the parties were not in agreement as to whether

certain 'development costs' including future 'development costs' were subject to the BDC cap at all. If the answer was in the affirmative, the parties wanted to know if an increase in the BDC cap ought to be made as a consequence of one or more of the underlying assumptions to the fixing of the BDC cap being invalidated. If the increase was permissible, the parties also wanted to know the extent of increment of the BDC cap. Because the plaintiff received its share of profits net of costs in that it was not responsible for nor did it contribute to any of these costs, the defendants remarked that the case was 'not a question of the plaintiff losing money.'

[72] As for the interpretations of article 15.5, Mr Beeley set out at paras 17 and 18 of his affidavit, the summarisation of the parties' interpretations as found in their closing submissions and as found in the arbitral records. For the defendants, article 15.5 works as follows:

(a) article 15.5(a) establishes a general proposition that development costs are cost recoverable, and should be cost recoverable as soon as there is sufficient cost oil available for this purpose;

(b) article 15.5(b) provides a limited departure from this general rule; in that a subset of development costs (-) the contractor's base development costs — are subject to a cap of 105% of a defined amount;

(c) article 15.5(c) provides a definition of both what is the scope of the contractor's base development costs (ie the costs incurred in establishing a production rate of 35,000 bopd) and what the BDC cap should be quantified at (in essence establish a deemed number which would serve as the BDC cap figure);

(d) article 15.5(d) serves to recite the assumptions which the parties relied on in setting out the BDC cap on the sub-set of costs; and

(e) article 15.5(e) serves two purposes:

(i) it expressly carves out certain development costs which might otherwise fall within the sub-set;

(ii) it provides an express mechanism for raising the BDC cap, would any of the assumptions provided at article 15.5(d) and in certain other cases prove false.

(f) article 15.5(f) provides a mechanism to resolve any disputes about the quantification of the increase required by the second limb of article 15.5(e).

[73] As for the plaintiff, this was its closing submissions on the interpretation of article 15.5, which is substantially what was articulated in the earlier paras:

1.5 article 15 entitles the contractor to recover Contract Costs. Article 15.5(b) imposes a cap on recovery of Development Costs. It provides that the contractor 'shall not, for the purposes only of determining the volume of Petroleum to which the Contractor shall be entitled under article 15.1 as Cost Petroleum, claim as Contract Costs Contractor's Development Costs incurred after the Effective Date in connection with Development Operations under the Rawa Development Plan which exceed Contractor's Base Development Costs (as hereinafter defined) by more than five percent (5%).

1.6 The cap is absolute — the contractor cannot claim any Petroleum by way of cost recovery in relation to costs incurred on any development operations under the Rawa Development Plan. This cap is not limited to costs necessary to achieve a production of 35,000 BOPD. The extent of the cap is the Base Development Costs - if the Claimant contends that the costs should be reduced by excluding some items (relating to facilities occasioned by the higher production rates or greater reservoir deposits) it would only reduce the cap. The costs captured by the cap are not defined by 15.5(c) but by 15.5(b) — they are ' … Development Costs incurred after the Effective Date in connection on with Development Operations under the Rawa Development Plan … '

1.7 Article 15.5 (c) defines 'Contractor's Base Development Costs'. The definition is exhaustive and not inclusive. It provides that the costs shall be those which are necessary for 'construction and/or establishment of such facilities as are necessary to produce, process, store and transport petroleum from within the existing discovery in order to enable crude oil production of 35,000 bopd in accordance with Rawa Development Plan … '

1.8 If Base Development Cost is limited to construing facilities less than those which are contemplated in the RDP, then the absolute cap in cl 15.5(b) would operate with reference to a lower figure of Base Development Costs.

1.9 The fundamental fallacy in the claimant's case is in assuming that the cap is imposed by article 15.5(c) and that the cap is therefore, with reference only to Base Development Cost and any cost other than Base Development Costs are recoverable. This contention is contrary to the plain language of article 15.5. The definition of the Base Development Cost is only for determining the quantum of the ceiling and not the true nature of the cap - the nature of the cap is fixed by cl 15.5(b).

1.10 It is the Government's position that quantum of Base Development Costs which are recoverable are not limited to the facilities for 35,000 bopd but extend to all activities as long as they are covered by the RDP — in other words, the cap is larger than the facilities necessary only for production of 35,000 bopd as long as the facilities are of the kind which are described in cl 15.5(c).

[74] Mr Beeley deposed that both parties 'argued that the other's interpretation of article 15.5 ran contrary to the words used therein'. He opined that the 'conflicting positions as to the interpretations … were particularly illustrated by the issue of cost recovery of seven wells that, factually had been drilled post 1998/1999.' He then proceeded to illustrate by explaining that the 'RDP had anticipated that some 19 oil producing wells

would be needed to allow a daily production rate of 35,000 BOPD, and further contemplated that two gas wells would be drilled.' The 35,000 BOPD was achieved by 'only drilling 14 producing wells' and 'the contractor went on to drill a series of additional (10 plus) wells to both further increase production levels … and to maintain that increased production profile for a longer period to maximise oil recovery from what turned out to be a much larger oil field.

[75] According to him, the defendants' position on 'these additional wells' was that they 'were directed at something beyond the contemplation of the RDP … and that the goal of the RDP had been completed, the costs of drilling these additional wells were, on its construction of article 15.5 of the PSC, outside the BDC cap'. The plaintiff however took the position that these seven wells were within the scope of works 'envisioned by the RDP … and accordingly would be subject to the BDC cap, irrespective of the motives and technical purpose of drilling them. Accordingly, the question of whether the list of facilities set out in article 15.5(c) was merely illustrative (the defendant's case) or whether it was a list of items which would be caught within the BDC cap regardless (the plaintiff's case) … '.

[76] Mr Beeley further deposed that ultimately, the arbitral tribunal's decision favoured both parties, but only in parts as it did not 'wholeheartedly adopt either party's position as regards the interpretation of article 15.5'. He pointed out that the arbitral tribunal 'rejected the defendants' argument that the BDC should be confined as only to apply to works necessary to achieve 35,000 BOPD rate'. Instead, it agreed with the plaintiff and ruled that the 'BDC cap applied to all 'Development Costs' which were incurred in carrying out the RDP' — see paras 97 to 999; and 107 to 110 of the award.

[77] However, on the question of increase to the BDC cap, the arbitral tribunal rejected the plaintiff's argument that there could be no increase until 21 wells had been drilled. It gave reasons which can be found in para 100 of the award before finally accepting the defendants' argument that the trigger factors had been met warranting an increase in the BDC cap. Mr Beeley contended that the decision of the tribunal was one which was reached after it had considered the parties' respective merits arguments as made during the arbitration.

[78] These arguments of Mr Beeley were taken up and amplified by learned counsel for the defendants. He, too, contended that the dispute indeed revolved around the interpretation of article 15.5. He submitted that both parties had delivered extensive pleadings, offered documentary and oral evidence, both factual and expert before making written and oral submissions before the arbitral tribunal on this central issue; much of which has been made available in the present proceedings by both sides. Before the arbitral tribunal,

both parties canvassed various positions on the interpretation of the PSC as a whole and specifically, on article 15.5. The parties also offered what they considered were the 'underlying factual matrix relevant to the operation and construction of article 15.5 of the PSC'.

[79] Insofar as the plaintiff's contentions that the arbitral tribunal was erroneous in its approach in the three respects already pointed out, that is the 21 wells/cap, reservoir and award in futuro issues, the defendants submitted that these contentions were 'unwarranted and wrong particularly when considered in the context of the underlying policy towards upholding arbitral awards'; and that these complaints do not meet the thresholds required for setting aside the award. In essence, the defendants argued that the plaintiff's application was nothing more than an attempt to reargue the merits of the case; seeking a second bite at the cherry. And, as mentioned earlier, that is quite outside the purview and function of this court.

[80] Quite aside from these arguments, the defendants contended that this allegation of error in approach in three respects on the part of the arbitral tribunal was really a case of the 'plaintiff's own making'. The defendants proceeded to examine each of the plaintiff's complaints and show how and where the plaintiff had either got it wrong or had misconstrued or misunderstood the award.

[81] In relation to the 21 wells/cap issue, it was submitted that the plaintiff's arguments were based on its own interpretations of the PSC and the RDP. The defendants argued that when making its point on the 'cost cap', that it could not be increased, the plaintiff itself failed take into account other terms in the PSC, for example article 15.5(e)(iii) which allowed the original BDC sum of US$188.98 stated in article 15.5(c) to be increased; or ignore the material before the arbitral tribunal. Such material or evidence included the initial 1993 plan which was prepared on certain assumptions, that is, ' … that the technical conclusions derived from the review of the filed data made available as part of the bid application preparation process will not be changed significantly after all the field information has been examined and analysed'.

[82] These assumptions and qualifications are said to have remained unchanged in the addendums that formed part of that plan. First, under the first addendum and later, the second addendum and the 1996 update. The relevant parts of these addendums were identified and set out, including the following:

> This addendum and the undertakings and commitments which it contains are based upon information made available to Command prior to 18 August 1993 and if the subsequent acquisition of additional data significantly and adversely alters the

> understanding outline in this addendum, then the Videocon-Command Joint Venture would need to review the undertakings referred to herein …

[83] In the second addendum, the amount of 35,000 BOPD was referred to as a 'plateau production', the objective to be achieved:

> A plateau rate of 35,000 BOPD would be comfortably achievable under the Development Plan. The Joint Venture's oil production and water injection programme is planned to maintain reservoir pressure and provide efficient sweep and we believe the 35.000 BOPD plateau rate could be maintained for more than 4 years and produce almost two-thirds of the estimated reserved of 100 MMBO

[84] It was the defendants' submission that ultimately, it was a 'question of contract construction, which was for the tribunal to decide'. And, the arbitral tribunal had decided, accepting some of the plaintiff's submissions while rejecting the some from the defendants before drawing its own conclusions and making its findings. The defendants submitted that the arbitral tribunal provided reasons for each consideration or course taken. Like the plaintiff, the defendants identified various parts of the award in support of these contentions, for example paras 97, 100, 101 to 105, 112 and 115.

[85] In relation to the reservoir issue, that the arbitral tribunal had 're-delineated the reservoir', the defendants submitted that the plaintiff's argument here was misplaced, premised on the fallacious assumptions that the award had equated 'enlarged reservoir' to 'New Discovery' or that the boundaries of 'Existing Discoveries' equals 'reservoir'. The defendants pointed out that this never transpired in the award — see paras 16 to 22 of Appendix 2 of the defendants' Rebuttal Points. According to the defendants, the defendants had used the 'reservoir trigger' argument to make its claim that development costs in excess of the BDC cap were incurred in connection with 'reserves and/or potential reserves, which under article 15.5(e)(ii) are not subject to the BDC cap'.

[86] The defendants further pointed out that these phrases such as 'increased reserves' and 'enlarged reservoir' and variants of these phrases were actually used interchangeably by all sides to reflect what was factually not in dispute; that is, there was more oil in the existing discoveries than initially contemplated; and the reservoir was larger than initially contemplated.

[87] In any case, the defendants submitted that in dealing with this point, the arbitral tribunal recognised that these phrases needed to be defined by reference to the context in which they were used — see paras 107 to 110 of the award. In these paras, the arbitral tribunal had clearly stated that the phrase 'reserves' was not defined in the PSC and that it referred to reserves distinct

from 'Satellite Fields'. By virtue of article 11.4, 'Satellite Fields' would have invoked the operation of article 10 on 'New Discovery'.

[88] At para 108, the arbitral tribunal had also specifically determined that the increased reserves formed part of the same reservoir as the existing discovery identified in article 11.1(b). The defendants then examined the definitions of 'reservoir', 'existing discoveries', 'satellite fields', 'discovery' and 'new discovery' before concluding that by definition, it was impossible for the increased reserves to be a 'new discovery' when they form part of an 'existing discovery'.

[89] The defendants further submitted that it was 'mischievous' of the plaintiff to have used 'para 109 of the award to suggest that the arbitral tribunal had determined that the increased reserves are outside the limits of the fault blocks defined in article 11.1; and this determination formed the basis of the conclusion at para 111 of the award that the increased reserved showed a range of materially different physical characteristics; and consequently, the tribunal must have determined that the 'increased reserves' do not form part of the 'existing discoveries' so that the mechanics of article 10 of the PSC relating to 'new discoveries' are attracted to the exclusion of article 15.5(e)(ii)(dd)'. This was because the arbitral tribunal ultimately rejected the defendants' claim on this basis as reflected in para 110 of the award.

[90] However, in considering what the defendants referred to as their 'tertiary argument' that if the BDC did apply, the development costs were incurred as a result of one or more factors listed in article 15.5(e)(iii) and thus an increase to the BDC was justified. It was in this respect that the arbitral tribunal had found that the defendants had succeeded in demonstrating that the 'range of physical reservoir characteristics being materially different' so as to trigger article 15.5(e)(iii)(dd) — see para 111 of the award.

[91] On this aspect, the defendants submitted that contrary to complaints, the plaintiff was given ample opportunity to present and deal with the issue. Experts from both sides were called (the plaintiff called two experts, namely Dr Prast and Dr Gopalakrishnan who dealt with, inter alia, the 'reservoir trigger' argument under article 15.5(e)(iii)(dd)); and their statements exchanged well in advance of the hearing. Further, this issue was pleaded in para 78 of its statement of claim. Once again, the defendants pointed to and extracted relevant parts of the plaintiff's submissions on the issue to further support its arguments — see paras 15 and 22 to 34 of Appendix 2 of the defendants' rebuttal points.

[92] Learned counsel for the defendants further submitted that the arguments canvassed in the present proceedings were premised on 'isolated reading of the tribunal's conclusions'. At its highest, the arguments of the

plaintiff remained at best, one of alleged error of law or fact, which are insufficient to establish a claim under sub-paras 37(1)(a)(iv) and (v) of Act 646. In fact, it was submitted that the plaintiff was seeking to 'pick holes' in the award by reading passages in isolation.

[93] Given that the plaintiff had extensively participated in the submissions on this issue, the defendants made the contention that there was indeed, no breach or violation of any of the rules of natural justice. The plaintiff's submissions here therefore are really nothing more than an afterthought.

[94] On the last allegation of the arbitral tribunal's error in approach, that it determined an award in futuro, the defendants referred to their statement of claim where a declaration as to the limits of future cost recovery or prospective development costs was specifically sought. In its response as found in its defence and counterclaim, the plaintiff had addressed this relief. The defendants further submitted that the plaintiff in any event never raised any jurisdictional objection to this aspect of the defendants' claim. There is therefore no basis for this allegation.

DETERMINATION OF THE COURT

[95] This application is made pursuant to sub-paras 37(1)(a)(iv) and (v) and (b)(ii) of Act 646. These provisions, with emphasis added by the court, read as follow:

Application for setting aside

37 (1) An award *may* be set aside by the High Court *only if*:

(a) the party making the application *provides proof* that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the *award deals* with a dispute *not contemplated by or not falling within the terms of the submission* to arbitration;

(v) subject to subsection (3), the *award contains decisions on matters beyond the scope of the submission* to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such

agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in *conflict with the public policy of Malaysia*.

Without limiting the generality of subpara (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a *breach of the rules of natural justice occurred*:

(i) during the arbitral proceedings; or

(ii) *in connection with the making of the award*.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[96] For the purpose of this application, the court has been invited to read these provisions with ss 30(2) and (5) of the same Act, which provisions again with emphasis added, are as follow:

Law applicable to substance of dispute

30. (1) In respect of a domestic arbitration where the seat of arbitration is in Malaysia, the arbitral tribunal shall decide the dispute in accordance with the substantive law of Malaysia.

(2) In respect of an international arbitration, the arbitral tribunal *shall decide the dispute in accordance with the law agreed upon by the parties as applicable to the substance of the dispute*.

(3) Any designation by the parties of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(4) Failing any agreement under subsection (2), the arbitral tribunal shall apply the law determined by the conflict of laws rules.

(5) The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction.

RELEVANCE OF MODEL LAW

[97] Section 37, as is much of Act 646, including its amendments passed in

2010 (Arbitration (Amendment) Act 2011 ('Act A1395') which came into force on 1 July 2011) is modeled on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration or UNCITRAL Model Law of 1985 ('Model Law').

[98] That being so, there is much assistance to be found in the preparatory materials to the Model Law, especially the explanatory note issued by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration (see *UNCITRAL Yearbook* Vol XVI — 1985), which though not issued as an official commentary on the Model Law, is noteworthy. It provides background and understanding on the Model Law and why Nation States have reached such comity on the desirability of uniformity in international commercial arbitration practice. This explanatory note remains relevant even though Malaysia adopted the Model Law only in 2005 vide the Arbitration Act of 2005, and even though it is with modifications.

[99] Reference and reliance on such material is not unusual; and it is not misplaced. On the contrary, as remarked by Sundra Rajoo and WSW Davidson on their early treatise on *The Arbitration Act 2005* (*UNCITRAL Model Law as applied in Malaysia*, Sweet & Maxwell 2007, p 5), the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 was persuaded by Lord Griffith's speech in the House of Lords' decision in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42; and later in *Lim Phin Kian v Kho Su Ming* [1996] 1 MLJ 1, to permit references to the records of Parliamentary debates or Hansard as an aid to statutory interpretation. And, as will become more apparent, there are many more reasons for allowing such reference in the context of arbitrations, especially international arbitrations.

[100] The explanatory note states that the General Assembly had recommended that all states give due consideration to the Model Law 'in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice'. The Model Law is 'a vehicle for harmonisation and improvement' and it 'reflects a worldwide consensus on the principles and important issues of international arbitration practice'; and that it 'is acceptable to states of all regions and the different legal or economic systems of the world'.

[101] When s 37 is compared with article 34 of the Model Law, drafting style aside, it may be said that sub-paras 37(1)(a)(iv) and (v), and sub-para 37(1)(b)(ii) are in fact modeled on articles 34(2)(a)(iii) and 34(2)(b)(ii) of the Model Law. Section 37 in effect, incorporates all the grounds found in article 34 of the Model Law; and more importantly, classes those grounds into two

categories and treats them with the same dictates. In other words, the one category of grounds where proof is furnished or required; the other where the court takes its own initiatives.

[102] Specifically and in the context of s 37 where the court is invited to set aside arbitral awards, it is interesting to note that the same explanatory note states at para 46 that these two categories of grounds under which the court may set aside an award is exhaustive:

> As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36(1), which is taken from article V of the New York Convention. The grounds provided in article 34(2) are set out in two categories. Grounds which are proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of valid arbitration agreement; lack of a notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of the arbitral proceedings are contrary to the effective agreement of the parties or failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject matter of the dispute or violation of public policy (which is understood as serious departures from fundamental notions of procedural justice).

[103] It further states at para 46 that the approach in article 34 on utilising grounds 'parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement.' The explanatory note then adds that 'The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.'

[104] In this respect, it is, I believe, not too late to say that not unlike the observations of Lord Steyn in the House of Lords decision in *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 at p 230 on the 'ethos of the 1996 Act', there is perhaps a need to recognize and take into account the 'radical nature of the changes' which have been brought about by the Arbitration Act of 2005 (Act 646) to arbitration and arbitration related matters in this country. Although Lord Steyn was there expressing his views in relation to the English Arbitration Act of 1996; those views are relevant.

[105] In support of his views, His Lordship quoted from the preface to Lord

Mustill and Stewart Boyd QC's *Commercial Arbitration 2001 Companion* Volume to the 2nd Ed where it was written:

> The Act has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities … have been replaced by the statue as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature.

[106] Of significance, too, is His Lordship's quote of Lord Wilberforce's explanation at the second reading of the bill (see p 231), where Lord Wilberforce, inter alia, said that the Act 'has given to the court only those essential powers which I believe the court should have; that is rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or alternatively, in the direction of correcting fundamental errors.'

[107] Another pertinent observation is that made by the writers, Redfern & Hunter on *International Arbitration* (5th Ed) Oxford University Press p 609, Model Law in a sense 'sets the internationally accepted standard for judicial control of international arbitration' with many States seeming to be 'content to accept this level of control'. This is reflected in article 5 of the Model Law which in turn is incorporated into our Act 646, via s 8 of Act 646:

> No Court shall intervene in matters governed by this Act, except where so provided in this Act.

[108] Section 8 as set out above is the provision as it now stands after the amendments brought vide Arbitration Act (Amendment) 2011. In my view, this was always the position; the amendments simply made it clearer. Although the courts here have long adopted a healthy respect for party autonomy where arbitration and arbitration related matters are concerned, the ethos of our 2005 Act may require an even more robust approach, speaking more in mandatory and certainly less in discretionary terms as much has been replaced by statute. This is particularly so given that international commercial arbitration has achieved fairly established common procedures and norms.

[109] The writers noted that despite such a provision, the national courts continue to react to this 'level of control' of court intervention differently; the writers described that it 'may be viewed as a spectrum'. At the one end, some courts exercising minimum control or allowing parties to contract out of control; to the other end of the spectrum operating 'a range of controls,

including a limited right of appeal on questions of law that the parties may agree to waive'. This is really in part caused by the realisation and recognition of a need to either guard against or minimise the risks of inconsistent decisions especially given the popularity of standard form contracts, be it for construction, shipping or insurance, to name a few. As for Malaysia, the extent of court intervention depends on whether it is a domestic or an international arbitration. I shall expand on this when discussing the matter of Part III of Act 646.

[110] Therefore, the 'philosophy' of the Model Law as set out in the explanatory note ought to be borne in mind when approaching and considering the application at hand. At the same time, it cannot be denied that while Act 646 may have been enacted in 2005, the lessons and approaches of other supervisory courts in jurisdictions which have adopted and applied Model Law, be it wholesale or in parts, with or without modification, remain both useful and instructive.

[111] Further, It may be added that this approach in looking at the decisions of these other jurisdictions contribute to the larger object of ensuring consistency and certainty in the courts' approach to arbitration and arbitration related matters as was explained in the explanatory note that was pointed out earlier. It cannot be gainsaid that this is vital to the promotion of investor or trader confidence especially in fast-paced and multifaceted international commerce and trade. The present case is no exception.

[112] Therefore, in the consideration of this application for intervention, these matters that I have just highlighted are relevant and will have some role to play.

REQUIREMENTS OF SUB-PARAS OF 37(1)(a)(iv) AND (v); AND (b)(ii)

[113] To start with, some understanding on the meaning and ambit of s 37 and in particular, sub-paras 37(1)(a)(iv) and (v) can be gained from the commentary on article 34(2)(a)(iii) of the Model Law by Gary B Born in *'International Commercial Arbitration'* (Vol II, Kluwer Law International, pp 2606 to 2610). As already pointed out, these sub-paras take their roots from article 34.

[114] The writer examined the approach of the courts from various jurisdictions on this ground of challenge, that the awards addressed matters outside the scope of the parties' submission at arbitration; and I agree with the defendants that this commentary is instructive on how the court here is to consider the plaintiff's application:

The most common basis for annulling awards under article 34(2)(a)(iii) is where the arbitrators 'rule(d) on issues not presented to (them) by the parties' — so called extra petita or ultra petita. Awards addressing matters outside the scope of the parties' submissions have been annulled by U.S., English, French, Swiss and other courts. Again, most courts are reluctant to accept such contentions.

Nonetheless, cases arise where a tribunal's award is annulled for addressing issues or granting relief that exceeds the scope of the claims presented to it by the parties. Even in such cases, however, an arbitral tribunal does not exceed its authority under article 34(2)(a)(iii) by relying on arguments or authorities not raised by the parties to support their claims.

Doubts about the scope of the parties' submissions are resolved in most legal systems in favor of encompassing matters decided by the arbitrators. Put differently, a considerable measure of judicial deference is accorded the arbitrators' interpretation of the scope of their mandate under the parties' submissions.

Courts are particularly unwilling to accept arguments that, by ignoring or refusing to give effect to the terms of the parties' underlying contract, the tribunal exceeded its authority. It is typically held that such arguments amount to an effort to obtain judicial review of the merits of the tribunal's decision; as such these efforts do not constitute an excess of authority and instead, at most, involve an allegedly incorrect decision in the exercise of such authority.

[115] *Redfern & Hunter on International Arbitration* pp 594–617; have also organised the grounds of challenge under article 34 into three broad categories: that which relate to the adjudicability of the claim as determined by the arbitral tribunal; procedural grounds; and substantive grounds.

[116] 'Adjudicability' generally relates to matters of jurisdiction whether because of incapacity or invalidity; excess of powers or simply the arbitrability of the subject matter of the dispute. Challenges on procedural grounds concern a lack of due process or 'deficiencies in the way the arbitral tribunal was appointed, or the arbitral procedure was conducted'. As for a challenge on substantive grounds which deal with contentions that there are mistakes of fact, mistakes of law and public policy; the writers cautioned that ' … there is seldom room for any form of appeal from an arbitral award, on the law or on the facts, or for any judicial review of the award on its merits. If the tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award — good, bad or indifferent — is final and binding on the parties'.

[117] In a separate publication by the same writers, *Alan Redfern & Martin Hunter* on *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) paras 9–26 p 416 which is also carried in *Redfern & Hunter* on *International Arbitration* (p 598), the same writers opined that a third ground of challenge against an award is actually a challenge on jurisdiction of the arbitral tribunal:

> The third ground for recourse against an arbitral award under the Model Law turns on issues of jurisdiction …
>
> … This third ground of challenge under the Model Law contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it. By way of example, the *Cour d'appel de Paris* has found that a tribunal exceeded its mission by awarding a party damages in an amount that significantly exceeded the damages claimed.

[118] This third ground would appear to be a challenge under article 34(2)(a)(iii) and it is therefore relevant for considering a challenge under our sub-paras 37(1)(a)(iv) and (v).

[119] Aside from the above considerations, there are particular requirements within sub-paras 37(1)(a)(iv) and (v); and (b)(ii), which are the grounds relied on by the plaintiff in this case.

[120] From the terms of these subparas, it is evident that the court is here vested with discretion to intervene in the award. Sub-section 37(1) uses the word 'may' as opposed to the word 'shall', the latter often treated as mandatory in its dictate and application. See for example, ss 8, 10 and 41(2) in Act 646.

[121] How this discretion is to be exercised, is as I have said earlier, guided by the best practices under the Model Law regime; subject to any specific requirements of Act 646 in general, and sub-para 37(1)(a)(iv) and (v) and (b)(ii), in particular. It goes without saying that this discretion must also be exercised judiciously.

[122] Within sub-paras 37(1)(a)(iv) and (v) is also this clear restriction, and that is the discretion ought to be exercised only and only if it is proved to the court the matters complained of. First of all, the phrase 'only if' is indicative of the intention of Parliament that the courts be conferred a limited discretion. By limited, it is to say that the discretion is subject to the provision of proof of any or all the matters complained of in (a)(i) to (vi) and/or (b)(ii).

[123] In this case, since the plaintiff is relying on sub-paras 37(1)(a)(iv) and (v); and (b)(ii), the plaintiff has to provide proof that there is evidence of the arbitral tribunal having rendered an award which 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration'; or 'subject to sub-s (3), the award contains decisions on matters beyond the scope of the submission to arbitration'; or that it is an award that is in conflict with the public policy of Malaysia.

[124] It is not enough to make general allegations of such grounds without

providing any evidence. It also goes without saying that the absence of such evidence must mean necessarily result in a refusal of the order(s) sought. To my mind, the presence of these two requirements suggests a 'minimalist' intervention approach ought to be adopted when dealing with challenges on these grounds.

[125] I find further support of this view in the requirement of 'proof' as opposed to there being none called for; or a requirement on a lower evidentiary threshold when dealing with a challenge under sub-paras 37(1)(a)(iv) and (v). The choice of this word is deliberate. It is also a stringent requirement of the sufficiency of evidence that must be brought before the court. As compared to the phrase 'appear' which is used in some legislations (see for example s 360 of the Capital Markets and Services Act 2007 (Act 671) where a lower standard of proof is required, the deliberate choice of the word 'proof' indicates that there must be certainty in proof.

[126] Insofar as the standard of proof is concerned, it must be on the civil balance of probabilities; and not the higher burden of beyond reasonable doubt. It is only where the court is satisfied that there is evidence certain of the matters alleged that the court has discretion to intervene for the purposes of setting aside the award. Where the court is not satisfied, it may be argued that there is no discretion at all. Again, this would be due to the presence of the clear emphatic words of 'only if'.

[127] The requirement of 'proof' is also to be found in s 39 of Act 646. Although this requirement is in relation to the grounds for refusing recognition or enforcement of an award (note the earlier observations of the UNCITRAL Secretariat's explanatory note on this), the approach of other courts concerning such a requirement is of good guidance. In this respect, the House of Lords' decision in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at p 813 is of some relevance.

[128] Lord Mance JSC opined that the respondent in that case had taken the 'correct position' on the issue of who bears the onus of proving the matters alleged of; that it was with the party objecting to the recognition of the award; that the *'objecting party has the burden of proof, which it may seek to discharge as it sees fit'*. Therefore, the burden of proving the present grounds of challenge lies with the plaintiff.

SUB-PARAGRAPHS 37(1)(a)(iv) AND (v)

[129] As discussed, a challenge under sub-paras 37(1)(a)(iv) and (v) must start with the assumption that the arbitral tribunal has substantive jurisdiction

in the first place; and the complaint is that the arbitral tribunal exceeded its powers by dealing with matters that had not been submitted to the tribunal. From the submissions and the cause papers, it would appear that the plaintiff is not suggesting otherwise.

[130] As to what the plaintiff is expected to prove when relying on sub-para 37(1)(a)(iv) and (v), I find assistance from the Singapore Court of Appeal's decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597.

[131] In that case, Chief Justice Chan Sek Keong, delivering the judgment of the court on what His Lordship described as an appeal that 'raises difficult and perplexing legal issues concerning the jurisdiction and powers of the arbitral tribunal s and their relationship with the supervisory powers of the court, in particular the powers of the court to set aside an arbitral award or arbitral decisions on matters that form part of or constitute the award'. As is the case in the present application, the plaintiff there had applied to set aside a second award on, inter alia, that the award deals with disputes or issues not contemplated by, or alternatively, not falling within the terms of the submission to arbitration and/or contains decisions on matters or issues beyond the scope of the submission to arbitration, thus leading to a breach of article 34(2)(a)(iii) of the Model Law.

[132] In upholding the decision of the High Court which had dismissed the application, the Court of Appeal found that the law on the jurisdiction of an arbitral tribunal was well established; that article 34 of the Model Law merely reflected 'the basic principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties.' The court adopted Lord Halsbury's observations in *London and North Western and Great Western Joint Rly Companies v Billington* [1899] AC 79 at p 81:

> I do not think any lawyer could reasonably contend that, when parties are referring differences to arbitration, under whatever authority that reference is made, you could for the first time introduce *a new difference after the order of arbitration was made*. Therefore, upon that question I certainly do give a very strong opinion.
>
> (Emphasis added.)

[133] The Court of Appeal found support for this principle in the decision of *Rederij Lalemant v Transportes Generales Navigacion SA (The Maria Lemos)* [1986] 1 Lloyd's Rep 45. In that case, the issue arose as to whether the arbitration tribunal had jurisdiction to hear the dispute about discharging port demurrage. In answer, the court held that:

> 39. … the jurisdiction that any arbitral tribunal could exercise was that bestowed by the parties and that the scope would depend on the terms in which the parties had defined it. To this end, the court examined the correspondence between the parties to ascertain their intention when appointing the arbitrator. The court found, at 47, as follows:
>
> The question, therefore, as it seems to me, is this: whether the appointment on Jan. 3 and 4 gave the arbitrators jurisdiction to determine not only what has been generally agreed called loading port demurrage but also, prospectively, to determine the quantum of discharging port demurrage, in so far as discharging port demurrage would flow from a finding by the arbitrators that the charterers were in breach before the vessel left the loading port. It seems to me that on any proper construction of the telex messages (which stated that the arbitration extended to all disputes under the charter) to which I have referred, it must follow that the parties were giving the arbitrators jurisdiction to that extent.
>
> The correspondence showed that they had intended the arbitration to extend to all disputes under the charter

[134] Subsequently, the Court of Appeal applied this decision in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at p 319. Again, the Court of Appeal reiterated that a challenge under article 34(2)(a)(iii) 'is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to if'.

[135] In *Sui Southern Gas Co Ltd v Habibullah Costal Power Co (Pte) Ltd* [2010] 3 SLR 1, the High Court was invited to intervene under article 34(2)(a)(iii) and 34(2)(b)(ii) of the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) of Singapore and set aside an award made in the defendant's favour. The court declined.

[136] Justice Judith Prakash examined how the Court of Appeal in *PT Asuransi* had applied Lord Halsbury's test as set out above to determine 'whether a particular issue (the June 2001 meeting) was within the jurisdiction of the tribunal'. The Court of Appeal found that the meeting ' … being *a new difference* arising after the First tribunal had been constituted, (Emphasis added), was not an issue within the original submission to arbitration and accordingly would have been *irrelevant to the issues requiring determination* in the First Arbitration (Emphasis added)'. Further, the Court of Appeal had held that the court was required to enter two separate but related enquiries:

> … first, the ascertainment of the matters that were within the scope of submission to the Second tribunal; and second, whether the second and third critical findings involved such matters.
>
> 34. Cumulatively, these passages from *PT Asuransi* make it clear that the correct approach to be adopted, in response to a claim that an arbitral award (or part thereof) was not within the scope of submission to arbitration, is for the court to ascertain:
>
> (a) the matters which were within the scope of submission to the arbitral tribunal s; and
>
> (b) whether the arbitral award (or the part being impugned) involved such matters, or whether it was a 'new difference' which would have been 'irrelevant to the issues requiring determination' by the arbitral tribunal.

[137] Therefore, in the exercise of discretion, the court will have to ascertain what matters were within the scope of submission to arbitration; and whether the award involved new difference or such matters which would have been irrelevant to the issues requiring determination by the arbitral tribunal. In ascertaining these matters, again, I agree with the defendants that some guidance may be gained from *Lesotho*, which although was a case under s 68 of the English Arbitration Act of 1996 does not alter or reduce its persuasiveness and relevance on this aspect:

> 32. In order to decide whether section 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under section 68(2)(b).

[138] The areas of intense focus identified by Lord Steyn, namely the arbitration agreement, the terms of reference, the relevant Act, must necessarily be true for the determination of a challenge of excess of jurisdiction or power since the arbitral tribunal takes its mandates from such sources.

[139] Further, it must be remembered that the courts tend to construe arbitration cls or agreements widely; as opined by Lord Hoffman who was speaking for the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep 254 at p 257, and I see no reason to depart from this:

> 13. In my opinion the construction of an arbitration cl should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal. The cl should be construed in accordance with this presumption

unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.

SUBPARA 37(1)(b)(ii)

[140] The plaintiff has also relied on subpara 37(1)(b)(ii) as a ground to setting aside the award, and that is, the award is said to be in conflict with the public policy of Malaysia.

[141] Model Law recognises that each state has its own concept of what is required of 'public policy'. Nevertheless, it may be said that since sub-para 37(1)(b)(ii) is subject to the same overlying conditions as sub-paras 37(1)(a)(iv) and (v), and that is it is discretionary, having regard to the context of the dispute, that it arises out of commercial and contractual transactions where parties have received more than adequate advice, including legal counsel; and that bargains are arms' length, the public policy that is envisaged in this provision must be read narrowly and more restrictively.

[142] Although there appears to be no requirement of 'proof in this subpara, and whilst the question of what amounts to 'public policy' may be a difficult one, I would also venture to say that the court nevertheless requires sufficient basis for such allegation or ground in order that it may 'find' that 'the award is in conflict with the public policy of Malaysia'. This requirement extends to not only identifying the particular public policy of Malaysia which is said to be conflicted but also to providing basis of the alleged conflict; that is how it is conflicted or breached; and how the breach has prejudiced the rights of the plaintiff.

[143] This makes the threshold high in that by its very nature, it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach or conflict with the public policy of Malaysia court. From the reasons offered, the court must be compelled to agree or that a strong case has been made out that the award conflicts with the public policy of Malaysia. Otherwise, the contractual arrangements of the parties must be maintained. These views were expressed in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111; and *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at pp 565–570, and I agree that it should be the case here.

[144] Discussions along these same lines can be found in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, *John Holland Pty Ltd (formerly known as John Holland*

Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan) [2001] 1 SLR(R) 443; affirmed in the Court of Appeal's decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86.

[145] This narrow approach was advocated and adopted by the Singapore Court of Appeal in *PT Asuransi*, p 622. The Chief Justice of Singapore expressed clear views that:

> 59. Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see Downer Connect (58) at (136), or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generalede L'lndustrie du Papier (RAKTA)* 508 F 2d 969 (second Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in A Guide to the *UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):
>
> In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice* … It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as *corruption, bribery or fraud* and similar serious cases would constitute a ground for setting aside. (Emphasis added.)

[146] The Singapore decision of *Sui Southern Gas Co Ltd* also dealt with a complaint of violation of public policy. The plaintiff there had made strong contentions that the award was 'perverse, manifestly unreasonable and irrational, and should therefore be set aside.' This allegation was raised to support two arguments.

[147] The first being that various circuits of the United States courts of appeal had recognised that a 'manifest disregard of the law' could justify vacating an arbitration award. A few of such decisions were cited. Because … the award was so manifestly unreasonable that no reasonable person could have so decided, the court was asked to intervene.

[148] In dismissing the application, Her Ladyship, Judith Prakash J held that

in essence, the plaintiff was asking the court to recognise that it could, independently of the Act, set aside arbitral awards which were *Wednesbury unreasonable*. According to Her Ladyship:

> This contention was untenable as a matter of principle and authority. Although the court undoubtedly has, on judicial review, a power to quash an administrative decision when its substantive merits are so absurd that no sensible person could have made that decision, I was of the view that no such power was available where the decision in question is made by an arbitral tribunal. This is because there is no appropriate analogy between administrative and arbitral decisions. Review for Wednesbury unreasonableness or irrationality exists because it is presumed that, when Parliament gives an administrative decision-maker a discretion, that discretion is not unfettered; rather Parliament intends that that discretion be exercised reasonably … This presumption of rationality, however, finds no purchase in the context of private arbitrations, where parties have contractually agreed to abide by the decision of the arbitral tribunal. Parties must therefore be held to that agreement, in the absence of any of the specific grounds for challenging an award set out by Parliament in the Act. The ability to challenge an award for unreasonable or irrationality is not a ground set out in the Act.

[149] The other aspect was that the award could not be so perverse and manifestly unreasonable that no reasonable tribunal could conclude that way. This, too was rejected by Her Ladyship who cited her previous decision in *VV and another v W* [2008] 2 SLR 929 where she had ruled that assertions of breach of public policy cannot be vague and generalised; that it was incumbent on the complainant to identify the particular public policy which the award allegedly breached and to show which part of the award conflicted with the public policy. Her Ladyship found that these mandates were not met and accordingly rejected the basis.

[150] Similarly, *Redfern and Hunter on International Arbitration* at p 614 also suggested that most States with 'developed arbitral jurisdictions' had 'similar conceptions of public policy'; interpreting this to mean that the award itself must conflict with fundamental notions of justice or conflict with fundamental national or economic values. Examples cited included decisions from the Swiss Federal Supreme Court, the German Courts, and the Superior Court of Justice of Ontario.

[151] Having examined the approach of these other courts as well as the view of the writers, it would appear that those same concepts of public policy prevail here. This is reflected in the terms of sub-s 37(2)(b), which sub-para 37(1)(b)(ii) must be read with; and it states:

> (2) Without limiting the generality of subpara (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:
>
> (a) the making of an award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred: A

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

[152] It is clear that while sub-s 37(2) serves to provide some examples of what may be considered as conflicting with the public policy of Malaysia; and it would be those awards which were induced or affected by fraud or corruption; or where there is a breach of natural justice, as is the case with proper statutory interpretation, any other complaint of conflict with public policy must fall within this genre as set out in paras 37(2)(a) and(b). Quite undisputedly, these two areas may be said to fall within the basic and fundamental notions or principles of justice. B C

[153] In addition, while sub-para 37(2) may contain the rider of 'Without limiting the generality of sub-para (1)(b)(ii)', a restrictive and narrow approach must be taken; and the court's curial intervention, minimum. I am fortified in my view when this provision is read together with s 8 of Act 646. D

[154] Even in the New Zealand case of *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 at pp 626–630 cited by the plaintiff in relation to the arguments under Part III of Act 646, the Court of Appeal there described the word 'public policy' used in article 34 of the Model Law as one which is in the 'higher sense', where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the 'integrity of the court's process and powers will thereby be abused'. E F

[155] The Court of Appeal there also referred to the decisions of *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd (t/a Shell International Trading Co)* [1990] 1 AC 295; *Parsons & Whittemore Overseas Co Inc v Societe Generalede L'Industrie du Papier* 508 F 2d 969;*Boardwalk Regency Corp v Maalouf* (1992) 6 OR (3d) 737 at p 743, *Soleimany v Soleimany* [1999] QB 785 at p 800. In the particular facts of *Amaltal Corporation*, the Court of Appeal affirmed the High Court's decision that the rule on the unenforceability of a contractual penalty clause was not a matter of public policy within article 34. The Court of Appeal agreed with the High Court that such a rule 'could not properly be categorised as so fundamental as to constitute 'public policy' in the sense in which those words have been used in article 34 or the sources form which that article was drawn' G H I

[156] I appreciate the Court of Appeal did not finally define the scope of public policy, nor did it have to in that case. Nevertheless, it made those points including remarking that 'the considerations of public policy could never be

exhaustively defined'; and that it favoured a narrower as opposed to wide view of the compass of the words 'public policy'. In the context of Malaysian law, it must be treated with caution and construed narrowly with the court finding compelling or strong reasons for intervention.

[157] Lest it be misconstrued that the courts are adopting a hands-off attitude when dealing with arbitration awards, it is in fact the contrary. These minimalistic interventions go towards supporting arbitration, giving healthy respect for autonomy, confidentially, commerciality and a host of multifarious reasons why many corporate entities opt for arbitration in the first place.

THE APPLICABLE LAW

[158] I pause here to deal with this matter of the applicable law. The plaintiff has contended that read with s 30, the court should set aside the award under sub-paras 37(1)(a)(iv) and (v); and (b)(ii). By virtue of s 30, the substantive law of the contract is Indian law of contracts. On the arguments that it had canvassed and which I had set out earlier, the plaintiff contended that the court should set aside the award relying on the Indian Supreme Court decision in *Saw Pipes*.

[159] With respect, I must disagree. When dealing with challenges under sub-paras 37(1)(a)(iv) and (v); and (b)(ii), the challenge is not determined by reference to the substantive law of the contract. As the seat of arbitration is Kuala Lumpur, the curial law is that of the seat, that is, Malaysian law; and it remains so even after the award has been granted or handed down.

[160] The Federal Court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 at p 455 was not inclined to follow the decision of the Indian Supreme Court in *Sumitomo Heavy Industries Ltd v ONGC Ltd* AIR 1998 SC 825, although endorsed subsequently in *M/s Dosco India Ltd v M/s Doosan Infracore Co Ltd* (Arbitration Petition No 5 of 2008) 2010 (9) UJ 4521 (SC) that took an otherwise position:

> …Thus, in this case as Kuala Lumpur was selected as the juridical seal of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied.

[161] Although Indian law is the substantive law or proper law of the

contract or PSC, and English law is the law of the arbitration agreement; that in no way means that Indian *lex arbitrii* applies on the determination of an application under s 37.

[162] It is pertinent to note that the Court of Appeal of Singapore in *PT Asuransi*, p 621, was also invited to apply the Supreme Court of India's decision in *Saw Pipes*. Similarly, it was argued that an arbitral award which in inconsistent with the provisions of the Indian Arbitration and Conciliation Act is thereby wrong in law and is patently illegal; and is therefore liable to be set aside on the ground that it conflicts with the public policy of India.

[163] The Court of Appeal declined. These were its reasons:

> … In other words, an error of law was contrary to the public policy of India as contemplated by the Indian Act.
>
> 57. While we have the greatest respect for the Supreme Court of India, we do not think that the reasoning in that decision is applicable to the legal framework under the Act. In our view, the legislative intent of the Indian Act reflected in the Indian decision is not reflected in the Act which, in contrast, gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the Act and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the Act, we are of the view that the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of submission to arbitration. In the present context, errors of law or fact, perse, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law.

[164] Aside from the courts in Singapore (see also *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and Another* [2006] 3 SLR 174; *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86, *AJU v AJT* [2011] 4 SLR 739), the courts in Hong Kong (see *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111) and New Zealand (see *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554) have taken similar approaches.

[165] I appreciate that the Court of Appeal in *PT Asuransi* was expressing its views in the context of a challenge on the ground of a conflict with public policy. This position however, maintains even when dealing with the other grounds relied on here as the Indian law on 'excess of jurisdiction' is not the

applicable law. I agree with the defendants that English law which is the substantive law of the arbitration agreement answers any questions on the jurisdiction of the arbitral tribunal. This was recognised in *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyds' Rep 45 at p 56:

> Before stating my reasons for that conclusion … and because questions have arisen as to whether English law or Indian law is appropriate to be applied at various stages of this application, I propose briefly to advert to the various laws potentially applicable to the various aspects of the arbitral relationship which may fall for consideration in cases of this kind.
>
> (1) The proper law of the underlying contract, ie the law governing the contract which creates substantive rights and obligations of the parties out of which the dispute has arisen.
>
> (2) The proper law of the arbitration agreement, ie the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award. This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator.
>
> (3) The proper law of the reference …
>
> (4) The curial law, ie the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

[166] Be that as it may, I find the views of Lord Steyn in *Lesotho*, p 233, on the expression of 'excess of power' and the court's approach to the complaint useful and applicable, given that it is the proper law to be applied.

[167] In this case, Impregilo SpA & Others (contractors) were engaged by Lesotho Highlands Development Authority (employer) to construct a dam in Lesotho. The law of the contract was the law of the Kingdom of Lesotho and the currency of account or payment was to be Maloti with provisions for conversions into the contractors' currencies at the exchange rate applicable on a specified date. The project was successfully completed but then a dispute arose in respect of the contractors' claims for reimbursements of increased costs. The employer rejected the claims and the dispute was referred to ICC arbitration in London. The arbitrators decided in favour of the contractors. Between the date of the award and the date when the payments should have been made, the Maloti had fallen heavily. Relying on s 48(4) of the English Arbitration Act of 1996 which allowed an award to be 'in any currency', the

arbitrators ordered the payment in the contractors' own currencies converted at the rate prescribed in the contract, which predated the collapse of the Maloti.

[168] The employer sought to set aside or remit the award on the ground of serious irregularity under s 68(2)(b) of the English Arbitration Act. That provision defined 'serious irregularity' to mean 'an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant … (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction'.

[169] While I appreciate that the challenge is not on precisely the same terms, the considerations are nevertheless valid. At p 233, Lord Steyn was prepared to allow the appeal on the currency point alone as his lordship was of the view that the arbitrators had unconstrained and available powers under s 48(4) to make the orders that it had made. However, he proceeded to nevertheless deal with the issue under s 68(2). In so doing, his lordship was prepared to pitch the case at the 'highest' and assume that the tribunal committed an error of law. Whether this in turn meant that the tribunal had 'exceeded its powers' within the meaning of s 68(2), His Lordship said:

> This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vested in the tribunal no excess of power under section 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point. There was no more than an erroneous exercise of power available under section 48(4). The jurisdictional challenge must therefore fail.

[170] Further along in his judgment, Lord Steyn explained the jurisprudence of s 68 by reference to the New York Convention and article 34 which His Lordship said '… were in part a provenance of s 68'. As the challenges of invalidity of an arbitration agreement and awards related to matters beyond the scope of submission to arbitration *'involve the competence of the arbitrator'* and deals with the power of the arbitrator, His Lordship opined:

> 30. … It is well established that article V(l)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award…The policy underlying section 68(2)(b) … similarly points to a restrictive interpretation.
>
> 31. By its very terms section 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal exceeding its powers under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a 'question of law' which may in the circumstances specified in section 69 be appealed against unless the parties have excluded that right by agreement …

A OTHER CONSIDERATIONS

[171] There are still several other factors that must be borne in mind when considering the exercise of discretionary power under sub-paras of 37(1)(a)(iv) and (v) and (b)(ii) of Act 646, and it is this — the court's powers are not invoked in the field of appellate jurisdiction. The court's powers here are specifically enacted under statute. Since the court does not sit in appellate capacity, the court does not scrutinise the merits of the parties' respective case or responses before the arbitral tribunal. The court must also resist interfering in the decisions of the arbitral tribunal save where it is prescribed under the Arbitration Act 2005.

[172] Quite aside from this, there is the principle which has remained constant, be it under the old Arbitration Act of 1952 or the new 2005 Act; and that is in the fundamental approach that courts generally bear when dealing with challenges of arbitral awards. Not only are courts slow to intervene even where there is discretion to do so, the courts are cognisant of the fact that as supervisory courts, there is a more than healthy respect for party autonomy and party choice. The courts here have long ascribed to this philosophy practiced in many jurisdictions.

[173] In this regard, the reminder in *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at p 575 by the High Court of New Zealand which cited Lord Mustiil's opinion in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] 3 NZLR 338n (PC) at pp 338–339 is most apt:

> (1) Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive, in retrospect, this is not always so. *Having agreed at the outset to take his disputed away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind.* The parties have made a choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complainant.
>
> (2) Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.

> (3) At the other extreme are complaints that the decision has been reached by methods which are unfair, contrary to natural justice, in breach of due process, or whatever the term is preferred. With very few exceptions all systems of law permit the injured party some means of recourse. They need not be explored, since there are no such allegations here.
>
> (Emphasis added.)

[174] In other words, as submitted by the defendants, 'a change of mind' is simply not permitted. The arbitral tribunal remains the 'sole judge' of facts as reaffirmed by the Court of Appeal in *Cairn Energy India Pty Ltd v The Government of India* [2009] 6 MLJ 795.

[175] It must be emphasised that this approach in no way means or is construed to mean that the evidence led or to be led for the present purposes relates or pertains to those matters which the arbitral tribunal has already made its findings. At no time is the court reviewing or reassessing the findings of the arbitral tribunal which remains the 'sole judge'. The substantive merits of the dispute in the arbitration remain within the exclusive domain of the arbitral tribunal and are not open for consideration by this court.

[176] Yet another principle to bear in mind is that the courts strive to uphold awards as opposed to approaching them with a 'meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration' Instead, Bingham J said in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* (1985) 2 EGLR 14:

> … Far from it. The approach is to read an arbitration award is a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it.

[177] This attitude was subscribed to by Tomlinson J in *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 at p 17. In fact, in the same decision, Tomlinson J examined several cases such as *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The MV Pamphilos)* [2002] 2 Lloyd's Rep 681; *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] 2 EGLR 149; and *Margulead Ltd v Exide Technologies* [2004] 2 All ER (Comm) 727, before echoing the courts' reluctance to intervene in awards.

[178] Finally, even where the court is satisfied on a balance of probabilities that there is evidence of the matters or grounds complained of, the court must still bear in mind the provisions of sub-s 37(3). This provision allows the court to set aside only those parts of the award 'not so submitted'; leaving and thereby saving those parts which were indeed submitted.

[179] Such powers are consistent with the approach that our courts have long recognised and adopted in respect of arbitrations. The courts have consistently acknowledged that the parties have not only preferred but opted for arbitration for the resolution of, subject to the terms of the arbitration cl, any disputes that may arise between them.

[180] For a valid and proper exercise of discretion under sub-para 37(1)(a)(iv)(v) and (b)(ii), what the plaintiff has to prove is that the arbitral tribunal ruled on an issue(s) that was not presented to the tribunal in the first place. In short, the arbitral tribunal would be said to have exceeded its authority or mandates; and it is unequivocal that the arbitral tribunal takes its authority from the submission of the parties.

[181] Having put the application in its proper context and as highlighted earlier, the observations of the defendants, made through both Mr Beeley and their learned counsel, on the preliminary issues such as how this challenge is to be dealt with, are therefore appropriate and correct.

PART III OF ACT 646

[182] Let me next deal with the matter of Part III of Act 646 which the parties have raised.

[183] Now, there are four Parts in the Arbitration Act of 2005. In Part I, there are five sections setting out 'Preliminary' matters such as the definitions and applications of the Act. Part II deals with arbitration itself and there are eight chapters on it. Chapter 1 deals with the 'General Provisions'; while Chapter 2 is on the arbitration agreement; Chapter 3 concerns the composition of arbitrators; Chapter 4, the jurisdiction of the arbitral tribunal; Chapter 5, the conduct of arbitral proceedings; Chapter 6 is on the making of the award and termination of proceedings; Chapter 7 is on recourse against award; and Chapter 8 is on recognition and enforcement of awards. Part III contains 'additional provisions relating to arbitration' and Part IV sets out the 'Miscellaneous' provisions.

[184] Act 646 operates on what is known as the 'opting in' and 'opting out' principle; depending on whether it is a domestic or an international arbitration.

[185] In respect of a domestic arbitration, where the seat of arbitration is in Malaysia, Parts I, II and IV apply while Part III applies unless the parties have agreed otherwise in writing. This is what is frequently referred to as the 'opting out' provision. Where international arbitrations are concerned and where the seat is in Malaysia, sub-s 3(3) provides that Parts I, II and IV apply but Part III

is not to apply unless the parties have otherwise agreed in writing. In short, Part III does not apply to international arbitrations unless the parties had agreed to its application in writing. This is the 'opting in' provision.

[186] This point was first raised by the defendant in their rebuttal points after the defendants found the submissions of the plaintiff 'littered with references' to 'excess of jurisdiction' and 'contradictory decisions not in accordance with the PSC'. Under s 42 which is to be found in Part III, arbitral awards may also be set aside upon a successful reference on questions of law arising out of the awards. The defendants submitted that since the parties had not opted for Part III of Act 646, it demonstrated the parties' intention not to have recourse to the courts where any complaints as to the award may have related to questions of law, including any interpretation determined by the arbitral tribunal.

[187] The defendants relied on the observations of Lord Steyn in *Lesotho* on the 'mutual exclusivity between 'procedural irregularity' challenge remedies under s 68 of the English 1996 Act and 'appeals on points of law' under s 69 of the English 1996 Act' to fortify the view that s 68 remedies do not extend to 'errors of law'. In the context of our present case, the defendants suggested that ss 37 and 42 are mutually exclusive; to extend the ambit of s 37 to include the matters that may be raised under s 42 would be to render redundant the provisions of s 42.

[188] The plaintiff disagreed and relied on *Amaltal Corporation Ltd v Maruha (HZ) Corporation Ltd* [2004] 2 NZLR 614 where the Court of Appeal of New Zealand took a contrary view. At p 625, the Court of Appeal agreed with counsel that the High Court judge's 'characterisation of the respective processes under cl 5 of the Second Schedule and art 34 of the First Schedule as 'mutually exclusive' is not sustainable'. According to the Court of Appeal:

> We see no reason why an appeal on a point of law under cl 5 cannot put in issue errors of process by the arbitrator as well as errors of substantive law. (Both can be grounds for setting aside under art 34 …

[189] On the issue of whether ss 37 and 42 are mutually exclusive, with respect, this does not require answering as the issue does not arise as s 42 is not relied on by the plaintiff. The only observation on *Amaltal Corporation* is that the Court of Appeal there was addressing provisions which though somewhat similar, are actually distinctly different from our present ss 37 and 42. The material difference being article 34 concerns applications to set aside whereas cl 5 of the Second Schedule allows appeals on questions of law. In neither of our ss 37 or 42 is the appellate jurisdiction of the court invoked.

[190] In keeping with the ethos of the 2005 Act, I am therefore inclined to construe s 37 narrowly together with the other principles that I have discussed at length given the seriousness of the application; and that such restrictive interpretation is not to include a re-examination of the merits of the award. That has always remained in the domain of the arbitral tribunal; in accordance with the decision of the parties.

THE IMPUGNED ORDERS

[191] While the plaintiff has sought to set aside the whole of the award, it is quite apparent that it is really 'unhappy' with and its complaint is in respect of the declaratory orders made in the defendants' favour, namely declarations F to H of the award. These orders have since been referred to as the 'impugned orders' by the plaintiff — see paras 19 and 20 of supporting affidavit affirmed by Partha Sarathi Das (encl 16). I believe this would include the declaratory order in 'I' in relation to the in *futuro* award.

[192] At this juncture, it may be useful to set out the declarations and the award; and this can be found at p 72:

> We therefore DECLARE AND award, as follows:
>
> (A) on the true construction of article 15.5 of the Production Sharing Contract dated 20 October 1994 ('the PSC'), all Development Costs incurred by the Claimants after the date of the PSC in connection with Development Operations under the Rawa Development Plan are subject to (as regards costs recovery from Costs Petroleum) to the cap imposed by article 15.5(b) of the PSC, namely, the amount defined as Base Development Costs by article 15.5
>
> (B) (c), plus 5 per cent (%);
>
> (C) the figure stated in article 15.5(c) of the PSC, namely $18.98 million, was agreed as the limit for Base Development Costs to be cost-recovered by the Claimants in connection with the Rawa Development Plan as it was agreed in August/October 1993;
>
> (D) the Claimants incurred Development Costs totaling $220,737,381 in connection therewith up to and including the contract year (31 March annually) 1999/2000;
>
> (E) the Claimants were not entitled to costs-recover such costs in excess of the agreed amount plus five per cent (5 %), namely, $198.43 million;
>
> (F) that the Claimants incurred Development Costs in connection therewith from contract years 2000/2001 until 2008/2009 in the sum of $278,871,668;
>
> (G) that in response to the Claimant's request, the amount of Base Development Costs in respect of such period shall be increased by $278,871,668 pursuant to article 15.5(e)(iii)(dd) of the PSC;

(H) that the Claimants were entitled to recover all such costs from Cost Petroleum, namely $278,871,668, made up as follows

accepted by the respondent	$65,952,604;
increased under (F) above	$212.919,064
Total	$278.871.668:

(I) that the Claimants are and shall be entitled to cost-recover further Base Development Costs incurred by them in connection with the Rawa Development Plan after the contract year 2008/2009, if and to the extent that-

(a) such costs are incurred in further development of the reserves defined by this award as being materially different from the physical characteristics of the reservoir on which the original (1993) Rawa Development Plan was based; and/or

(b) the amount of the cap under article 15.5(b) of the PSC may be increased hereafter pursuant to article 15.5(e)(iii) of the PSC; and/or

(c) as the parties may agree;

but not otherwise.

(J) that the respondent is entitled to be credited with the sum of $22,307,381 in the final settlement of cost recovery accounts in relation to Development Costs incurred during the contract years 1994/5 to 1999/2000 in excess of $198.43 million;

169. The Claimants and the respondent are not entitled to Declaratory or other relief, on their Claim and Counterclaim respectively, save to the extent stated herein.

[193] The plaintiff's complaints of the award lies in the arbitral tribunal having rendered the orders set out above, especially declarations F to H which the plaintiff claim to be beyond the terms of submission by the parties within the meaning of sub-paras 37(1)(a)(iv) and (v); and (b)(ii).

[194] This excess occurs in that the construction and interpretation given by the arbitral tribunal was one that was simply not tenable or possible under the terms of the PSC; and which the plaintiff claimed amounted to rewriting the terms of the PSC. According to the plaintiff, the RDP envisaged the drilling and development of 21 wells that were not segregated. These 21 wells were to be treated as a single work programme which was submitted by the defendants in the first place and which formed part of the PSC. The plaintiff said that the arbitral tribunal accepted this. The parties themselves were also said to have recognised the costs of drilling more than 21 wells would fall outside the cap and be fully recoverable.

[195] Yet, the arbitral tribunal contradicted itself by departing from this

position; and various parts of the award were cited in support. Further, the plaintiff claimed that when the arbitral tribunal 'elevates the production level of 35,000 bopd to the status of a cut-off justifying the terminating of the application of the cost cap and ignores the agreed work programme under article 15.5(c)(i) to (xi)'; it effectively rewrote the PSC. This was said to be wrong as it was not fundamentally permissible under the substantive law of the PSC.

[196] This excess further includes rendering a decision which deals with a matter that the plaintiff claimed it did not even have an opportunity to address, thereby violating one of the basic tenets of natural justice. It would be safe to say, even at this point, that if true, would be against the public policy of any civilised nation which respects the rule of law; and that includes Malaysia. This was in relation to the reservoir issue; that in allowing the defendants' claim to full recovery of their costs under article 15.5(e)(iii)(dd) of the PSC, the plaintiff claimed that the award contained a reasoning that involved a decision to re-delineate the reservoir. Such an exercise cannot be validly done under article 15.5(e)(iii)(dd) or article 15.5(f)(ii). This then exceeded the terms of submission to arbitration and because it had not been heard, is contrary to Malaysian public policy.

[197] Then, there is the argument that the award found in declaration (I) was bad because it was a decision on a matter that was not referred; that it pre-determined 'a future dispute as yet unformulated or presented'. Again, this would render the award liable to be set aside under the same provisions of s 37.

[198] However, as mentioned at the start of my decision, after having very carefully scrutinised the cause papers and after considering all the extensive written and oral submissions made, including the case law involved, and most important, the award rendered by the arbitral tribunal, and after applying the principles as enunciated above, with great respect, the court disagrees the plaintiff and holds that there is no room for any of the plaintiff's allegations, complaints, concerns or grounds.

[199] On the contrary, the court finds that the arbitral tribunal has, at all time, acted and decided entirely within the parameters of the submission by the parties. The arbitral tribunal displayed extreme care and concern in their deliberations, ensuring that they knew and understood what were the submissions before them and what was required of them; received quite properly, documentary and oral evidence from all parties including expert evidence; considered all that evidence and submissions; deliberated and rendered a reasoned award. The contents of the award reflect the great care taken by the arbitral tribunal and it is testimony of the reasons why they were chosen by the parties themselves in the first place.

[200] The court cannot ignore the composition of this arbitral tribunal in particular. Quite evidently, the tribunal has been deliberately and consciously appointed by the parties on the strength of their relevant expertise, competence, familiarity and experience necessary for the single purpose of resolving the dispute at hand. The Chairman, Sir Anthony Evans QC, is a former English Court of Appeal Judge and the first Chief Justice of the Dubai International Financial Centre Courts; the plaintiff's nominated arbitrator is Dr AS Anand, a former Chief Justice of the Supreme Court of India; and Mr Andrew Berkeley, a legally trained United Kingdom based international commercial arbitrator specialised in oil and gas disputes.

[201] These persons could not have been more appropriate to form the arbitral tribunal for and in this case. It would not be unreasonable to say that each of them would have engaged their particular expertise, knowledge and experience to ensure that the award is at all times, within the parameters of their jurisdiction. Not that these eminent persons cannot get it wrong what with such equally eminent panels of solicitors and counsel representing the respective parties at the arbitration; but that the court will be slower to find it so. Respect must be accorded to them, not blindly but rightly.

[202] I find that the award indeed reflects the conscientious, careful, anxious and balanced deliberations of the arbitral tribunal. As observed by Colman J in *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The MV Pamphilos)* [2002] 2 Lloyds' Rep 681 and cited with approval by Tomlinson J in *ABB AG v Hochtief Airport GmbH*, 18.

> … In many cases, such as this, the arbitrators have been appointed because of their professional, legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasised that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's powers to make findings of fact relevant to the issues between the parties.

[203] It is apparent that the arbitral tribunal had the following when considering and making its award: factual witness statements; expert reports; documentary exhibits; extensive pre and post hearing written submissions with substantial legal authorities and the transcripts of six days proceedings. They also had the benefit of hearing and observing the oral evidence of witnesses; and they heard oral submissions on top of receiving the written submissions. This reputable panel rendered their reasoned and comprehensive award unanimously.

[204] For a challenge under sub-paras 37(1)(a)(iv) and (v) and (b)(ii), the proper place to start would be to address the question of the scope of the

arbitration and thereby the arbitral tribunal's jurisdiction. This is determined by the terms of the submission. As pointed out earlier, it starts on the premise that the parties, especially the plaintiff, accepts that the arbitral tribunal has substantive jurisdiction to deal with the issues; but it had exceeded its powers as these issues were not within the terms of submission.

[205] Here, I agree with the defendants that the arbitration agreement is housed in article 34 of the PSC and it does provide for 'all disputes, differences or claims arising out of or in connection with any of the terms and conditions' of the PSC or concerning the PSC's interpretation to be referred to arbitration. Even taking a narrow approach on arbitration agreements, it is quite apparent that the arbitral tribunal has the necessary jurisdiction to deal with the issues that it finally did.

[206] The scope of arbitration can be determined by the terms of reference to arbitration or the notice of arbitration issued by the defendants and indeed from the pleadings and submissions of both parties. As will be seen, the arbitral tribunal was ultimately dealing and deciding on the matters referred or submitted to arbitration by the parties.

[207] This is the invocation of arbitration issued by the defendants vide their letter dated 18 August 2008:

> To,
>
> Ministry of Petroleum and Natural Gas
>
> Government of India
>
> Shastri Bhavan
>
> Dr Rajendra Prasad Marg
>
> New Delhi-110001
>
> Kind attention: Secretary to the Government of India
>
> Sub: Invocation of Arbitration in respect of Production Sharing Contract dated 28.8.1994, pertaining to the Contract Area identified as Rawa Oil and Gas Field - Increase in Base Development Costs
>
> Ref: Our letter dated 11 August, 2008
>
> We write to you in further reference of our letter dated 11th August 2008 on behalf of ourselves, Videocon Industries Limited and Rawa Oil (Singapore) Pte Limited (collectively the 'Companies')
>
> As you are aware, the Companies have incurred Base Development Costs in excess of what has been contemplated under article 15 of the Production and Sharing Contract dated 28 October 1994 ("Production Sharing Contract") as a result of circumstances envisaged under article 15.5 (e)(iii) of the Production Sharing

Contract. As a consequence, therefore, in October 2002 the Companies sought the prompt consideration/agreement of the management committee to increase the Contractor's Base Development Costs in terms of article 15.5(e)(iii) of the PSC. A

The issue of increasing the Base Development Costs under the provisions of the captioned Production Sharing Contract has been deliberated extensively amongst the Members of the management committee for long without any consensus being reached to date. This issue had also come up for discussion before the management committee at its meeting held on 25th March 2008. It is a matter of record that all the representatives of the Contractor Parties on the management committee are in favour of increasing the Base Development Costs by reference to article 15.5 (e)(iii) whereas only the representatives of the Government of India is against such increase. B C

In view of the existence of a dispute/difference between the Government of India and the Contractor Parties on the issue of consideration and agreement to the increased Based Development Costs, the Companies proposed referring the issue to a Sole Expert (as contemplated under articles 15.5 (f) and 34.2 of the Production Sharing Contract) and in that regard issued a letter to you dated 11th August 2008, a copy of which was faxed to you on the same date. D

In this letter of 11th August 2008, the Companies had proposed the name of Mr Daniel Johnston for appointment as the Sole Expert. Further, you had been called upon to either convey your agreement to the proposed name or propose an alternative name by close of business on 14th August 2008. The said letter also provided that in the event of there being no response within the aforesaid time limit or should we be unable to accept any alternate name suggested by yourself, it will be deemed that the parties were unable to agree on a Sole Expert. E

Since our said letter dated 11th August 2008 did not elicit any response from you, the Companies have no alternative but to invoke article 34.3 of the PSC and demand reference of the aforesaid dispute to arbitration. F

Further, the Companies hereby notify your goodself that they have appointed Mr Andrew Berkeley of 49, Arden Road, London N3 3AD as their arbitrator pursuant to article 34.3 of the Contract. The Companies hereby call upon your goodself to appoint the second arbitrator pursuant to article 34.4 of the Contract within 30 days of receipt of this Notice and to notify the Companies of the name and address of the second arbitrator so appointed. In the event that your goodself fails to appoint the second arbitrator within 30 days, the Companies will request that the second arbitrator be appointed by the Secretary General of the Permanent Court of Arbitration at The Hague as provided in cl 34.5 of the Contract. G H

This is without prejudice to all our rights, claims, remedies and entitlement in law and under the Contract.

Kind regards

Indrajit Banerjee Chief I

Financial Officer

[208] Further answers can be found in the pleadings filed by the parties; and

such pleadings should also not be approached too narrowly. Recently, in the decision of *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98, the Singapore Court of Appeal reversed the High Court's decision of confining the jurisdiction of the arbitral tribunal to the pleadings, adopted the approach of Lord Steyn in *Lesotho* and applied its own earlier decision in *PT Asuransi*, and held:

> An arbitration agreement is merely an agreement between parties to submit their disputes for arbitration. The disputes submitted for arbitration determine the scope of the arbitration. It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of the submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.

[209] Specifically, and in relation to pleadings, the court said that its role 'is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication'. — see p 30. The court was of the view that the High Court 'took too narrow an approach in determining the extent or scope of the arbitrator's jurisdiction under the parties' submission to jurisdiction.'

[210] If one were to examine the pleadings before the arbitral tribunal, it becomes clear that the plaintiff's complaints are unfounded. At para 2 of the defendants/claimants' statement of claim, it is stated:

> These claims are a consequence of a dispute which has arisen between the parties in relation to the Rawa Oil and Gas Production Sharing Contract, dated 28 October 1994 (the 'PSC'). Principally these claims have arisen in relation to a disagreement between the parties over the recovery by the Claimants of actual capital costs incurred by them in carrying out pre-approved development work on the Rawa Oil and Gas Field (the 'Rawa Field'), to the ultimate financial benefit of all parties, including the GOI, who receives the greatest share of profits from the Rawa Field over time.
>
> Despite Claimants having cost recovered such sums for over a decade with the GOI's full knowledge, the GOI has now threatened to claw back the monies -effectively seeking to rewrite the terms of the PSC to force the Companies to bear the cost capital investment out of their profits, while the GOI reaps the benefit of the investment it has induced them to make.

[211] At para 8 of the statement of claim, the claim is summarised in the following terms, that it was for the defendants to: A

(a) confirm their contractual entitlement to recover certain costs, as they have done so under the PSC for well over a decade; and

(b) protect themselves from demands by GOI for the repayment of that recovery. B

[212] In its defence, the plaintiff responded that the defendants' claim had:

> … no contractual or legal basis. In fact, they are contrary to the express terms of the Contract where under the Claimants have agreed to undertake and complete Base Development work within the existing discoveries in the Contract Area at a total cost of US$188.98 million plus 5%. The cost was agreed upon through negotiation pursuant to international competitive bidding … The Claimants cannot claim any escalation as no ground for such escalation existed … The Claimants were entitled to cost recovery of only the capped cost of US$198,429,000 for carrying out all the activities of Base Development as enumerated in the Contract. Any claim over and above the said cap is wholly untenable and has no Contractual or legal basis. The Claimants are not at all entitled to a declaration C D E

[213] The plaintiff then went into further details on the merits as to why it made those denials. The responses included explanations as to the relevant principles of interpretation of the PSC; and the position of the BDC under article 15.5 of the PSC. Its defence and counterclaim run to some 151 pages long. F

[214] Consequent to its position as on the BDC, the plaintiff counterclaimed; seeking:

(a) an award declaring that the claimants have made excess cost recoveries in connection with BDC and were not entitled to cost recover the amount over and above USD 195.65m and therefore, they are liable to reverse such cost recovery already made; and G

(b) an award qualifying the GOI's share of profit petroleum due with interest @ LIBOR plus 2%. H

[215] In the defendants' reply and defence to counterclaim, the defendants, inter alia, said: I

> Following the service of GOI's Statement of Defence and Counterclaim (the 'SoD'), the scope of the dispute between the parties has been helpfully narrowed. However, significant disputes remain — in particular as to whether article 15.5 of the PSC should be given any genuine meaning, and as to the true nature of the obligation to complete the Contractor's Base Development. In its SoD, the GOI argues that the

mechanism within article 15.5 should be given no effective meaning, and that the obligation to complete the Contractor's Base Development was an obligation to build certain specified facilities rather than to achieve a certain end production target (as the PSC expressly states). With respect, the GOI's purported answers to these questions are offensive to the plain meaning of the Production Sharing Contract, Indian principles of contractual interpretation, industry practice and common sense.

[216] At para 9, the defendants summarised the plaintiff's arguments:

(a) First, that the BDC cap is an absolute cap, irrespective of any contractual provisions to the contrary, and that in any event, the circumstances the Claimants complain of as justifying an increase are either immaterial (despite their cost impact) or foreseeable (despite them being unknown at the time of the Plan) and that therefore no increase should be granted.

(b) Secondly, in relation to the Additional Facilities, the GOI argues that the Contractor's Base Development is a mandatory list of exact facilities that must be built, rather than an obligation to achieve a certain production target using whatever means are most appropriate under the PSC mandated standard of good international petroleum industry practice. It uses this false premise to defend itself from allowing further cost recovery as:

(i) it alleges that to the extent that the exact facilities contemplated under the Contractor's Base Development are uncompleted there should be a moratorium on any further cost recovery (despite the absence of any contractual language to this effect); and

(ii) It alleges that to the extent that the exact facilities contemplated under the Contractor's Base Development have not yet been completed, then these works should be 'topped up' out of Development Operations that have nothing to do with achieving the target production rate of 35,000 bopd (stretching the language of the PSC beyond its natural and ordinary meaning) or alternatively, the BDC cap should actually be lowered (irrespective of there being no contractual mechanism to do so).

[217] The defendants then followed up with what it termed 'a true construction of the PSC' — see para 11.

[218] The contents of the notice, especially the second and third paras clearly indicate that the arbitral tribunal was invited to deal with the dispute concerning the defendants' entitlement to cost recovery or actual expenditure (Base Development Costs, BDC) incurred in the exploration and development of and production from the Rawa Field, particularly in relation to the defendants achieving 35,000 BOPD. The defendants were seeking an increase which the plaintiff had plainly refused; consequently, the parties were in

obvious dispute as to entitlement and calculations under the PSC. The provisions concerning these costs are provided in article 15.5 of the PSC.

[219] I am fortified when the plaintiff's submissions before the arbitral tribunal are examined. After providing all its reasons and evidence in support, the plaintiff, inter alia, claimed that 'the defendants' claim to increase the base development cost by US$48,959,361 for achieving a so-called 'target production rate' of 35,000 bopd for the period ending with 1999-2000 is imaginary and fictitious and is not eligible under article 15.5(e) of the PSC; that US$278,871,668 incurred during 2000-2001 to 2008-2009 are expenditure incurred on base development except to the extent of US$6,952,604 and hence are within the BDC limit; the cost recovery taken for base development program in excess of the BDC limit stipulated under article 15.5(b) of the PSC is not in accordance with the PSC; the BDC cap of US$188.98 million is applicable for completion of entire work program agreed under article 15.5 (c)(i) to (xiv) and therefore BDC will not be available in respect of work program yet to be done;… '

[220] By reason of its position as far as the development costs are concerned, the plaintiff's counterclaim sought for re-calculation of the profit petroleum sharing by disallowing the excess cost recovery made by the defendants beyond the BDC cost cap. However, the related accounts were still subject to finalisation and approval of the management committee in view of the differences between the parties on the development costs.

[221] I am further fortified in my conclusions when the reliefs sought by the defendants are examined (see p 589 of exh PSD4 of encl 16), especially prayers 1, 2 and 3:

1. a declaration that, in respect of the achievement of the original target of 35,000 bopd, the contractor's base development costs (with a consequential increase to the BDC cap) should be increased (under article 15.5(c)(e)(iii) of the PSC) to, at a minimum, US$48,959,361, or such other amount as the tribunal finds justified, and such increase is granted;

2. either a declaration that:

   (a) the BDC cap only applies to development costs incurred in achieving the original target of 35,000 bopd and accordingly the additional development costs are not subject to the BDC cap and thus the amount of US$278,871,668 (or such other sum as the tribunal finds justified) is cost recoverable as development costs; or

   (b) a further increase of US$278,871,668 (or such other sum as the

tribunal finds justified) should be made to the contractor's base development costs in addition to that granted under 1 above.

3. a declaration that Claimants are entitled to cost recovery any subsequent development costs of additional development costs incurred by the Contractor in performing work which has been approved by the management committee under the PSC.

[222] Bearing in mind the earlier deliberations that arbitration agreements ought to be read widely, I agree with the defendants that these documents show that the dispute on the costs recovery or base development costs under article 15.5 referred to both past and prospective consideration of such costs.

[223] The submissions filed by the plaintiff further indicate that the plaintiff was well aware that the costs sought were not restricted to those already spent. As pointed out by the defendants, the plaintiff responded and led counter-submissions on the merits of this issue without any complaint or reservation. The decision of the arbitral tribunal on what the plaintiff now terms as '7/7 futuro' ground is really without merit and therefore must be dismissed. The arbitral tribunal's determination was not only a 'natural and direct consequence' but part of the essential substance of the dispute of the parties over what was always the interpretation of article 15.5 of the PSC.

[224] Proceeding then to the complaint about the 21 wells and cap issue; with respect, I must also disagree with the plaintiff. The plaintiff's present arguments are clearly arguments of its own interpretation and construction of the RDP, the work programme and the PSC; and how its interpretation was received, or not received by the arbitral tribunal. In fact, if I may say so, the arguments here as well as those on the alleged re-delineation of the reservoir were also canvassed before the august arbitral tribunal; but those arguments were rejected.

[225] An examination of the contents of the award confirms that the arbitral tribunal did nothing else but determined the dispute within the four corners of the submission. After dealing with the preliminary matters, the arbitral tribunal dealt with:

(a) history and background (paras 5–9);

(b) cost and profit sharing (paras 10–11);

(c) interpretation — the correct approach (paras 12–14);

(d) article 15 (paras 15–30);

(e) the dispute (paras 31–37);

(f) the Rawa development plan (paras 38–43);

(g) the relationship between the Rawa development plan and the PSC (paras 44–45);

(h) the scope of the PSC and of article 15.5 in particular (paras 46–50);

(i) article 15.5 (paras 51–58);

(j) article 15.5(d) and (e) (paras 59–69);

(k) outline history (paras 70–80);

(l) findings (para 81);

(i) the application of article 15.5:

(A) nature of the dispute (paras 8284);

(B) the parties' contentions (paras 85–94);

(C) discussion and findings (paras 95–100);

(ii) post 1999/2000 (paras 101–106):

(a) article 15.5(e)(ii) — 'reserves and/or potential reserves' (paras 107–110);

(b) article 15.5 (e)(iii)(dd) — 'materially different physical reservoir characteristics' (para 111)

(iii) conclusions (paras 112–115);

(m) claims and quantification (paras 116–124);

(i) reduce by $2.78 million? (paras 125–126);

(ii) increase under article 15.5(e)(iii):

(A) between 1994/1995 and 1999/2000 (paras 127–144);

(B) between 1999/2000 and 2008/2009 (paras 145–146);

(n) counterclaim (paras 147–152);

(o) relief and remedies (paras 153–168);

(p) declarations (para 169);

(q) injunction claim (paras 170–174);

(r) seat (paras 175–178); and

(s) award as to costs.

[226] As will be seen, these signposts chart the careful evaluations and deliberations of the arbitral tribunal; and they readily reveal that the arbitral tribunal was, at all time, on top of things, so to speak. The arbitral tribunal

started by inter alia acquainting itself with the scheme of the PSC; cost recovery and the approach to be adopted when interpreting the PSC. It was conscious that the governing law of the PSC was Indian Law — see para 12. At para 13; it voiced that:

> The parties representatives have made detailed submissions as to the meaning and effect of the relevant sub-cls of article 15.5 and of other relevant provisions of the PSC. They are agreed that the tribunal should seek to interpret these in a way which is consistent with the commercial realities and common-sense, seeking to give effect to the common intention of the parties as it appears from the words they agreed.

[227] This approach surely cannot be said to be inconsistent with the position under Indian law on contract. From paras 15 to 30, the arbitral tribunal took pains to understand article 15.5 and each of its sub-articles before concluding at para 30 that article 15.5 'was carefully drafted and that its object was to give effect to a general undertaking by the contractor that it would not seek to recover from cost petroleum more than the agreed amount in respect of its costs incurred in 'carrying out the development operations contemplated by the Rawa development plan' (quoted from article 15.5(d)(iii). However, that undertaking was qualified by the express formulation in sub-article 15.5(c) which contains the definition of 'Contractor's Base Development Costs' …

[228] Next, it made sure that it understood 'the dispute', the RDP, the relationship between the RDP and the PSC; and the scope of the PSC, especially article 15.5. Here, it made sure that it familiarised itself with terms such as 'new discoveries', 'existing discoveries' and 'development of satellite fields' before embarking on a fuller examination of the dispute in the context of article 15.5, with particular focus on article 15.5(d) and (e); and the history of the project.

[229] It was after it had done all this that the arbitral tribunal proceeded to make effectively eleven findings of fact at paras 81 and 82. These findings critically formed the basis of the application of article 15.5 and the conclusions reached in the award and it would be useful to set them out:

> 81. Against this background, we make the following findings of fact-
>
> (i) The PSC was signed and became effective on 28 October 1994.
>
> (ii) The first meeting of the management committee took place on 29 November 1994.
>
> (iii) The Contractors took over from ONGC as Operators of the Rawa Field in early 1995. The production rate at that time was about 3000 bopd.
>
> (iv) In July 1996 the Contractors made a written Proposal to increase the cap under article 15.5 of the PSC to US$207. The proposal was never agreed.
>
> (v) In December 1996 the Contractors produced a Rawa Development Plan -

Status and Update ('the 1996 Update'). This contained further and more detailed information about the Existing Discoveries, in particular the Fault Block described by reference to Well R17 in article 11.1(b) of the PSC. It was established that the fault line to the north-west of this block was not sealed, as was previously supposed. Instead, the sand was found to be porous and in pressure communication with a further large area of oil-bearing sandstone forming part of the same reservoir. The Update described the combined area as the 'RA/D Block'. The inter-connection made it necessary to increase the capacity of the facilities intended for the Fault Block and to extend their operation to the whole of the larger area.

(vi) The increased volume of oil reserves and the greater-than-expected pressure in the production wells together extended the length of the production plateau at the then production rate of 35,000 bopd and they also made it possible to increase the rate to 50,000 bopd without reducing the total recovery from the field as it was found to exist.

(vii) From December 1996 the Contractors were pressing the Government and ONGC representatives on the management committee to permit the projected increase to a production rate of 50,000 bopd. This was finally approved by the management committee on 25 March 1998 and by the Government on 1 April 1999.

(viii) By 31 March 1999 the Contractors had constructed and established such facilities as were necessary to produce, process, store and transport Petroleum from within the Existing Discoveries in order to enable Crude Oil production of 35,000 in accordance with the Rawa Development Plan as annexed to the PSC. The said facilities included 14 (fourteen) production and development wells.

(ix) During the year 1999/2000 and in subsequent years the Contractors carried out further development work in connection with the Rawa Field and in accordance with Work Programme and Budgets approved annually by the management committee.

(x) During the years 2000/2001 to 2007/2008 the Contractors drilled seven more development and production wells in the relevant area, so completing the total of twenty one wells specified in article 15.5(c) of the PSC.

(xi) Throughout the said period the management committee was constituted as set out in article 6.2 of the PSC so that it included representatives of each of the Contractors and of the ONGC and of the Government.

[230] These findings of fact, it would appear, became the bedrock of the orders made in the award as the arbitral tribunal, inter alia, said at paras 83 and 84:

83. The major issue, therefore, is whether the Contractors were entitled to recover more than $264.35 million ($198.40 m, the contract figure, plus $65.95m accepted by the respondent) from Cost Petroleum in respect of Development Costs incurred in 1994/1995 until 2008/2009.

84. The subsidiary issue is whether the agreed figure for the cap under article 15.5(b) and (c) should be reduced by $2.78 m in respect of the jetty and gas equipment that has not been built.

[231] Upon those factual findings, the arbitral tribunal proceeded to discuss the parties' contentions at great length (paras 95 to 100). And, this is where the reasoning of the arbitral tribunal becomes even clearer. It stated at para 96:

> The key to understanding the draftsman's reference to 'Base Development Costs' in sub-article (b) lies, in our view, in the fact that the PSC was entered into for a period of twenty-five years (article 2) and in relation to the whole of the Contract Area. The production target described in the Plan was expected to be achieved within a period of about two or three years and it related only to the Existing Discoveries. It was inevitable that achieving that target should be regarded as the initial phase of developing the Contract Area, and understandable that the draftsman should describe the capital investment required for that purpose as the 'Base Development Costs'. They were quantified as $188.98 million, calculated as shown in the Plan, and they were capped at 105% of that figure.

[232] It then went on to say at para 97:

> For these reasons we hold, first, that the cap in article 15.5(b) applies to Development Costs incurred 'in connection with Development Operations under the Rawa Development Plan', not to 'Base Development Costs' which are defined in sub-para (c) for the purpose of calculating the amount of the cap imposed by sub-para (b). The respondent is correct in submitting that the scope of sub-articles (b) and (c) is the same, because (c) quantifies the amount of 'Development Costs incurred … in connection with' the Plan for the purposes of (b).

[233] But, the arbitral tribunal did not stop there; it went further to explain at paras 98 and 99 that:

> 98. It is correct to describe the development costs defined as Base Development Costs in (c) as a 'sub-set' of Development Costs incurred by the Contractors under the PSC, but they are not a sub-set of sub-article (b). Rather, both (b) and (c) refer to the same costs, and they are a sub-set of the general category referred to in sub-article (a).
>
> 99. Moreover, the relevant 'Base Development Costs' defined and quantified in sub-article (c) are those incurred by the Contractors in connection with implementing the Plan as it was agreed in October 1993 ('the 1993 Plan'). The cap in sub-article (b) applies to development costs of that description, whenever they might be incurred, and it is not subject to any time-limit, though the cap ceases to have any relevance when all such costs have been incurred.

[234] In relation to the plaintiff's contention that the cap continued to apply until the 21 wells was reached, it was rejected and the arbitral tribunal gave its reasons at para 100:

> … We reject this contention, first, on the general ground that the *Contractors agreed a fixed limit on the cost of Development Operations in connection with the 1993 Plan, not necessarily to comply with the list in all respects.* If it proved necessary, as it did, to drill the full number in order to implement the 1993 Plan, it would be unrealistic and certainly uncommercial to require them to drill more than the Plan required. Secondly, in order to give effect to the parties' intentions at the time of the PSC, *the reference to 21 wells can be interpreted as their current estimate of the number of wells that would be required to achieve the object of the 1993 Plan and of the PSC.* In the event, of course, further wells were drilled, but that was not for the purpose of producing oil at the rate and over the period envisaged by the original Plan. Only fourteen wells were drilled in connection with the Plan as it was agreed in 1993.
>
> (Emphasis added.)

[235] Quite clearly, the arbitral tribunal was interpreting article 15.5 in relation to the PSC, conscious of its 'careful' drafting; and having regard to the circumstances it was made, and when it was made. In considering how article 15.5 was to be applied in the circumstances that had actually arisen, the arbitral tribunal made further findings of fact and said:

> 101. … The Outline History and the specific Findings (above) show that the Field was developed in accordance with the original Plan until 1999/2000. Development Operations continued thereafter, and were approved by the management committee, following the discovery that oil-bearing rocks extended beyond the Fault Blocks described in article 11.1 of the PSC, and that both the volume of the reserves and the production pressure of the oil were far greater than had been supposed at the time of the PSC.
>
> 102. We find that the Development Operations authorized by the management committee for the years 1999/2000 and following were for the purpose of developing the increased reserves, including but not limited to increasing the plateau production rate from 35,000 bopd to 50,000 bopd. In this connection, we accept the evidence of Mr Foster that there was no direct correlation between the production rate of 50,000 bopd which the Contractors sought in the original versions of the Plan, and the same rate which was approved in 1998/9. The former was proposed for the reserves which the Field was then thought to hold, namely, about 100 million barrels, and it gave rise to concerns about the effect that production at that rate would have on the ultimate maximum recovery from the Field. By 1998, when the full extent of the reserves and the production pressures were known to be greater than was anticipated, different considerations applied and the figure of 50,000 bopd was approved on that basis.

[236] In my view, the essence of the plaintiff's complaint here is that the arbitral tribunal got it wrong not because it could not make the decisions that

it did, but it was a decision that the plaintiff disagreed with. From just some of the paras in the award that I have set out, it becomes abundantly obvious that the plaintiff's submissions on the cap that it makes in court today are actually not new.

[237] Ultimately, it boils down to a matter of interpretation and construction of the terms of the PSC; especially article 15.5 and its myriad of sub-articles; and its interplay with other material provisions of the PSC. Let me start with article 15 which provides for 'Recovery of Costs for Oil and Gas'.

Specifically, article 15.5 provides for recovery of development costs and 5% Cost Cap. It reads as follows:

> (a) Development Costs incurred by the Contractor in the Contract Area shall be aggregated, and the Contractor shall be entitled to recover out of Cost Petroleum the aggregate of such Development Costs at the rate of one hundred percent (100%) per annum.
>
> (b) Notwithstanding the provisions of article 15.5(a) and subject to the remaining provisions of this article 15.5, the Contractor shall not, for the purposes only of determining the volume of Petroleum to which Contractor shall be entitled under article 15.1 as Cost Petroleum, claim as Contract Costs Contractor's Development Costs incurred after the Effective Date in connection with Development Operations under the Rawa Development Plan which exceed Contractor's Base Development Costs (as hereinafter defined) by more than five percent (5%).
>
> (c) For the purposes of this article 15.5, 'Contractor's Base Development Costs' means costs incurred after the Effective Date relating to the construction and/or establishment of such facilities as are necessary to produce, process, store and transport Petroleum from within the Existing Discoveries, in order to enable Crude Oil production of 35,000 BOPD in accordance with the Rawa Development Plan plus such costs as are allowed pursuant to Section 3.3 of the Accounting Procedure. Such costs shall include, but not be limited to, costs incurred in relation to the following facilities and matters in connection therewith, such as:
>
> (i) offshore tanker loading facilities for tankers up to 120,000 DWT;
>
> (ii) …
>
> (ix) geophysical, geological and petroleum engineering studies;
>
> (x) …
>
> (xi) the drilling of nineteen (19) Development Wells and two Gas production Wells;
>
> (xii) …

(xiii)…

(xiv)…

The Parties agree that for the purposes of this article 15.5 the Contractor's Base Development Costs shall be the sum of US$188.98 million (as indicated in the August 1993 addendum to the Rawa Development Plan).

(d) The Parties acknowledge that the amount representing Contractors' Base Development Costs has been agreed by Contractor on the basis of the following assumptions and/or factors and/or information:

(i) costs relating to Site Restoration and exploration or appraisal drilling have not been included in the calculation of the said amount;

(ii) the said amount does not include any costs for the development of any Satellite Fields;

(iii) the Contractor being able to obtain all necessary approvals (including Government and State Government approvals) to the enable Contractor to carry out the Development Operations contemplated by the Rawa Development Plan in accordance with the timings set out in such plan;

(iv) the date relating to the Contract Area provided by ONGC from time to time prior to the Effective Date inclusive of the data package pertaining to the Contract Area prepared by ONGC and made available for inspection and purchase by the Companies pursuant to the Government's 'Notice Inviting Offers For Joint Ventures to Develop Medium-Sized Oil And Gas Fields in India, 1992';

(v) international market conditions prevailing as at August 1993 relating to the availability and costs of materials and services in the international petroleum industry; and

(vi) the range of physical reservoir characteristics not being materially different from the ranges for such characteristics on which the Rawa Development Plan has been based.

(e) Having regard, inter alia, to the matters referred to in article 15.5(d), the Parties agree as follows:

(i) costs relating to Site Restoration and exploration and appraisal drilling shall not be subject to the limit on Contractors' Development Costs as provided in article 15.5(b);

(ii) the costs of developing the reserves and/or potential reserves and/or Satellite Fields referred to in article 15.5(d)(ii) shall not be subject to the limit on Contractors' Development Costs as provided in article 15.5(b), notwithstanding that the development of such reserves

and/or potential reserves and/or Satellite Fields may include shared flow lines, injection lines, gas-lift lines and other facilities with those constructed as part of the Rawa Development Plan;

(iii) in the event that the Contractors' Based Development Costs are exceeded by more than five percent (5%) as a result of:

(aa) delays in carrying out the Development Operations referred to in article 15.5(d)(iii) due to a delay in obtaining any necessary approval;

(bb) material changes to the Rawa Development Plan necessitated by Contractors' review of data provided to the Companies by the Government and/or ONGC after the Effective Date pursuant to article 8.1(a)(iv), where the Companies are able to establish that had such data been available prior to the Effective Date then the Companies -acting reasonably, would have included such changes in the Rawa Development Plan;

(cc) a material change to the international market conditions referred to in article 15.5(d)(v);

(dd) the range of physical reservoir characteristics being materially different from the ranges for such characteristics on which the Rawa Development Plan has been based;

(ee) a variation to the Rawa Development Plan approved by the management committee; or

(ff) an event of force majeure as provided in article 32;

then the management committee shall, at the request of the Operator, in a meeting convened under article 6.7, promptly what, if any, increase should be made to the Contractors' Base Development Costs to fairly reflect the circumstances in question PROVIDED THAT in the case of delays referred to in article 15.5(e)(iii)(aa) the management committee shall not be obliged to consider any increase where such delay has been caused by the Contractors' failure to act in a diligent manner.

(f) In the event that:

(i) there is any dispute between the Parties whether or to what extent a circumstance referred to in article 15.5(e)(iii) has arisen or resulted in the Contractors' Base Development Costs being exceeded by more than five percent (5%); or

(ii) the management committee is unable to agree whether an increase should be made to the Contractors' Base Development Costs or is unable to agree on the amount of any such increase;

then, at any time after thirty (30) days from the date of the management committee meeting referred to in article 15.5(e)(iii), any Party shall be at liberty to refer the matter to a Sole Expert for decision in accordance with the provisions of article 34.2.

[238] From the terms of the award on article 15.5, I must agree with the defendants that the arbitral tribunal was merely construing article 15.5 in relation to each of the sub-articles and, other terms in the PSC; and applying such construction to the findings of fact that it had made. The defendants have pointed to some details in the award in support and I agree.

[239] To add, I find that the award contains conclusions that the arbitral tribunal made upon findings of fact which were obviously not made mechanistically, but with full evaluation of the evidence presented before it. As observed, the arbitral tribunal considered the outline history and made specific findings. It took into account the 1996 update, its incorporation into the work programme and budget for 1997/1998 for the increase in production from 35000 BOPD to 50000 BOPD which was approved by the DGH and the plaintiff. At para 115, the arbitral tribunal found that there were de facto revisions of the RDP that sufficiently complied with article 11.3 so as to allow the defendants to contend that the RDP was amended so that the costs incurred after 1999/2000 were incurred in connection with the RDP, as amended.

[240] Under such circumstances, I cannot see how that can possibly be a ground to suggest that the award dealt with a dispute that was not contemplated or not falling within the terms of submission. On the contrary, the award fully contains matters well within the terms of submission by the parties. There is nothing irrelevant that would render the award beyond those terms. This ground therefore must similarly be rejected.

[241] On the matter of re-delineation, again, with respect, this must be rejected. After examining the award, it, too, is apparent that there is absolutely no basis for such suggestion. The parties had argued the matter well and fully before the arbitral tribunal with each side calling experts to deal with the matter.

[242] As alluded to earlier, the award recognised that the PSC made clear distinctions between 'existing discoveries', 'new discoveries', 'satellite field'. At para 105, the arbitral tribunal said:

> … Neither party contends that the increased reserves were a New Discovery, or a Satellite Field, and we hold that they were not. They were an extension of the original Block R17 which the parties did not know existed when they agreed the definition of Existing Discoveries in article 11 January Nor is it contended that the

increased reserves were outside the scope of the PSC; indeed, the Claimants rely upon article 15.5(a) to found their claim to recover their Development Costs from Cost Petroleum.

106. We hold that the increased reserves formed part of the 'Existing Reserves' for the purposes of the PSC, and on that basis, the further costs of developing them were incurred 'in connection with Development Operations under the Rawa Development Plan'. The result is that sub-article 15.5 applies to them, subject to the operation of sub-article 15.5(e).

[243] Since the arbitral tribunal had found that the increased reserves were subject to sub-article 15.5(e), it next proceeded to examine the claim under that sub-article; whether it applied. In so doing, it accepted the evidence of Mr Crouch, an expert called by the defendants 'that the enlarged reservoir known as Block A/D which we have called the increased reserves showed a range of physical characteristics that was materially different from those of fault blocks defined in article 11.1 on which the plan was based.' — see para 111 of the award. Clearly, this was a finding of fact which was within the knowledge of the plaintiff and which in any case, had been addressed by the plaintiff. This finding was the basis upon which this part of the award was rendered.

[244] Therefore, it goes without saying that the remarks made by the arbitral tribunal must be appreciated and understood in its full context. When so done, it will be readily seen that the arbitral tribunal did not infer the deposit of petroleum was located in new field. On the contrary, it was emphatic in making it clear that the discovery was within existing discovery. The award did not involve any matter which came within the understanding of a 'new difference' which would have been 'irrelevant to the issues requiring determination' by the arbitral tribunal. This aspect of the award was further reliant and is not divorced from the award's earlier findings of fact. These matters are entirely within the jurisdiction of the award.

CONCLUSION

[245] For all the reasons stated above, and taking the approach that I have explained at the outset of my determination, I find that the award is entirely proper and in accord with the mandates as given by the parties.

[246] None of the orders or decisions made was of the character alleged. The evidence showed that the parties were fully aware of the precise issues submitted; and those issues finally were the same ones determined in the award. The parties, especially the plaintiff had every opportunity to present its arguments and it did so ably, quite comprehensively and very adequately. There is not an iota of evidence to suggest any breach of any rule of natural justice to begin with as well. The complaints are therefore, completely without basis.

[247] With respect, the plaintiff's arguments tended to read particular clauses of the PSC in isolation or exclusion of the other cls when in fact, the way it was drafted (including under Indian law), it behoves parties to read each cl carefully as frequently, it is dependent on another or must be read with another provision elsewhere in the production sharing contract. As illustration, article 15.5(c)(xi) must be read together with article 15.5(e)(iii). Further, any word or remark made by the arbitral tribunal in any part of the award must be read as part and parcel of that comprehensive whole; lest it results in a situation of 'pick holes' with the award.

[248] The arbitral tribunal has done everything that was required by the parties. The court's examination of the award shows that the arbitral tribunal did not, as a matter of fact and in actuality, do any of the things that it now stands accused of. The award did not involve any 'new difference' which would have been irrelevant to the issues requiring determination by the arbitral tribunal.

[249] Therefore, the requirements of sub-paras 37(1)(a)(iv) and (v) and (b)(ii) have simply not been met. There is no proof or evidence of any of the matters alleged. The burden has not been discharged by the plaintiff.

[250] I must add that even if the arbitral tribunal did come close to committing any of the errors that are now complained of, those are but errors that are within its mandates and are not open to the purview or scrutiny of the Court. The Court is not here to replace the tribunal's interpretations or conclusions. In *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The MV Pamphilos)* p 687 which I have cited earlier, Colman J also commented on the arbitrators' 'autonomous power' to make findings of fact and his comments are now cited in full:

> Particularly where there are complex factual issues it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact which have been in issue. In such a case the tribunal does not have to refer back to its evidential analysis for further submissions. A typical situation is where arbitrators arrive at a conclusion on an issue of expert evidence which differs to some extent from that put forward by either opposing expert. In many cases, such as this, the arbitrators have been appointed because of their professional, legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasised that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties.

[251] The observations of Tomlinson J in *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1, at p 19 must also be heeded; that it is not a ground for intervention that:

> …the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore it is particularly to be borne in mind in the context of international arbitrations that the arbitrators may not all have been brought up in the same legal tradition. In order to express the reasons for their award they must find language with which each is comfortable.

[252] I do not, for any moment, consider that this court would have treated or dealt with the dispute 'differently or expressed' any matter in quite some other fashion; nor do I have any desire to do so. This is not the function of this court. As expressed, this reasoned and well rationalised award has dealt with the dispute entirely within the ambit and contemplation of the terms submitted by the parties. There is no reason whatsoever to merit any exercise of discretion for intervention by the sourt.

[253] Accordingly, the application is dismissed with costs. Although the defendants have submitted that costs be borne on an indemnity basis, I do not find this a suitable or appropriate case. The costs should and will remain on party and party scale. A suitable amount shall be RM100,000. This sum is appropriate given the numerous issues that have been raised, the complexity of those issues, the extensive research and getting up done to which the court is indeed grateful for; the seniority of counsel involved, to name some primary reasons. I, therefore, order that this sum be paid to the defendants.

Application dismissed with costs of RM100,000.

Reported by Afiq Mohamad Noor